



1           IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -  
3   MONICAH OKOBA OPATI, IN HER OWN       )  
4   RIGHT, AND AS EXECUTRIX OF THE        )  
5   ESTATE OF CAROLINE SETLA OPATI,        )  
6   DECEASED, ET AL.,                    )  
7                                    Petitioners,        )  
8                                    v.                    ) No. 17-1268  
9   REPUBLIC OF SUDAN, ET AL.,            )  
10                                    Respondents.        )  
11   - - - - -

12                                    Washington, D.C.  
13                                    Monday, February 24, 2020

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16           The above-entitled matter came on for  
17   oral argument before the Supreme Court of the  
18   United States at 11:10 a.m.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MATTHEW D. MCGILL, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF:	
6	ERICA L. ROSS, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioners	17
9	ORAL ARGUMENT OF:	
10	CHRISTOPHER M. CURRAN, ESQ.	
11	On behalf of the Respondents	28
12	REBUTTAL ARGUMENT OF:	
13	MATTHEW D. MCGILL, ESQ.	
14	On behalf of the Petitioners	60
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 17-1268, Opati versus the Republic -- Republic of Sudan.

Mr. McGill.

ORAL ARGUMENT OF MATTHEW D. MCGILL

ON BEHALF OF THE PETITIONERS

MR. MCGILL: Mr. Chief Justice, and may it please the Court:

Sudan provided Al Qaeda with a safe haven and vital material support enabling it to carry out the embassy bombings, killing 224 people and wounding thousands more. In retaliation, President Clinton sent 13 cruise missiles into Khartoum. But to impose punitive damages, Sudan argues, somehow would violate principles of fundamental fairness embodied in the Landgraf presumption.

If fairness is the issue here, then Sudan surely should lose. The State Department had designated Sudan as a state sponsor of terrorism in 1993, but Sudan continued to shelter Osama Bin Laden even as he issued fatwahs calling for attacks on U.S. interests.

1 In 1996 Congress enacted the Flatow amendment  
2 which, which explicitly provided for punitive  
3 damages for acts of state-sponsored terrorism.  
4 But still Sudan continued to harbor Al Qaeda.

5 Sudan had ample opportunity to conform  
6 its primary conduct to U.S. law. It just chose  
7 not to. And that's not particularly surprising,  
8 because Sudan is a foreign government and  
9 foreign governments generally are not guided in  
10 their policymaking by changes to U.S. law. The  
11 central rationale underpinning the Landgraf  
12 presumption simply is not applicable where the  
13 legislation is directed at foreign governments.

14 But, ultimately, this Court need not  
15 decide here whether Landgraf or Altmann applies,  
16 because the first step in the analysis is to  
17 determine whether Congress has clearly defined  
18 the statute's temporal reach.

19 And here it is abundantly clear that  
20 Congress intended punitive damages be available  
21 in two carefully defined categories of cases  
22 involving past acts of terrorism.

23 In the subsection entitled Application  
24 to Pending Cases, Congress set forth two  
25 categories of cases, prior actions and related

1 actions, each of which were unmistakably  
2 directed at past acts of terrorism.

3 Then the amendments say, in  
4 Section 1083(c)(1), the amendments made by this  
5 section shall apply to any claim arising under  
6 Section 1605A. Congress had said prior -- prior  
7 actions and related actions could file under  
8 this new 1605A, and now Congress is saying the  
9 amendments made by this section shall apply to  
10 any of those claims.

11 And Sudan concedes, at page 43 of its  
12 brief, that that meant all of the amendments in  
13 Section 1983 apply to a claim arising under  
14 Section 1605A.

15 That language, "shall apply to" -- "to  
16 any claim," is virtually identical to the  
17 language in footnote 8 of Landgraf, "shall apply  
18 to all proceedings," that -- that Landgraf  
19 described as an unambiguous directive and that  
20 the Court later in Martin versus Hadix described  
21 as unambiguously addressing the temporal reach  
22 of the statute.

23 JUSTICE ALITO: In a case involving  
24 private -- a private defendant, rather than a  
25 sovereign nation, are there constitutional

1 limits on Congress's ability to make punitive  
2 damages retroactive?

3 MR. MCGILL: Yes, I think under this  
4 Court's decision at least in BMW versus Gore,  
5 the Due Process Clause imports some idea of fair  
6 notice that would be applicable to persons, but  
7 foreign states are not persons within the  
8 meaning of the Due Process Clause, just as  
9 states of the union are not.

10 JUSTICE ALITO: So if we just apply  
11 the Landgraf test, what would be wrong with  
12 saying if Congress wants to make punitive  
13 damages retroactive, it has to say so expressly?  
14 There is a magic words requirement?

15 MR. MCGILL: That would be  
16 inconsistent with the -- how the Court looked at  
17 it in Landgraf. The language in footnote 8 of  
18 Landgraf just roped together compensatory and  
19 punitive damages. It -- actually, it didn't  
20 even reference either specifically. It just  
21 said Section 8 shall apply to all proceedings  
22 pending on the date of enactment. And Section 8  
23 provided for compensatory damages and punitive  
24 damages.

25 There was no magic words requirement



1 applicable in Landgraf. And this Court  
2 recognized -- but not -- not only in Landgraf,  
3 but later in Martin versus Hadix, that that was  
4 sufficient to unambiguously address the temporal  
5 reach of the statute. And --

6 JUSTICE GINSBURG: Is Sudan simply  
7 wrong when it tells us, as it did in its brief,  
8 that the Court has never permitted retroactive  
9 application of a statutory authorization of  
10 punitive damages in any context?

11 MR. MCGILL: I'm not -- I'm not aware  
12 that Sudan is wrong as to what it said, but the  
13 Court was very clear in Landgraf that if the  
14 1990 bill had been enacted, that would have been  
15 sufficient. And that bill is no more or less  
16 clear than Section 1980 -- Section 1083(c) as  
17 enacted by Congress in 2008.

18 It says -- the language is almost  
19 exactly the same, "shall apply to all  
20 proceedings" versus "shall apply to any claim."  
21 And Sudan concedes, it's important to note, that  
22 every single word of Section 1083 applies  
23 retroactively, except the two words "punitive  
24 damages."

25 There's no -- there's no application

1 of the Landgraf presumption that works in that  
2 way. That's -- there's no textual basis for  
3 extracting punitive damages from the rest of  
4 Section 1083.

5 JUSTICE KAGAN: Mr. McGill, is it  
6 really right that it does -- all the rest of it  
7 does apply retroactively? And I mean that in  
8 this sense, that under the old statutory scheme,  
9 1605(a)(7), wouldn't a person have been able to  
10 get compensatory damages and all the other  
11 damages anyway? So that the only new thing that  
12 was added by way of this creation of a cause of  
13 action is the punitive damages. So I guess that  
14 would be a reason to think of the punitives,  
15 separate and apart from all the rest, as  
16 retroactive.

17 MR. MCGILL: No, it's not correct,  
18 Justice Kagan, because as part of -- part of the  
19 rationale for Congress enacting a federal cause  
20 of action was that the Court in the Peterson  
21 case involving the 1983 Marine Corps barracks  
22 bombing, it held that persons -- family members  
23 proceeding under Pennsylvania law and Louisiana  
24 law had no -- had no remedy because the state --  
25 the state law didn't permit for intentional

1 infliction of emotional distress for persons not  
2 present at the scene of the bombing.

3           So -- so Congress enacted -- in the  
4 federal cause of action, it -- it created a  
5 remedy that did not otherwise exist for  
6 compensatory damages in that limited instance,  
7 at least.

8           I would point to --

9           JUSTICE KAGAN: Well, I guess -- I  
10 mean, it definitely created -- maybe I'm not --  
11 not understanding the answer. It definitely  
12 created a cause of action, but in what  
13 circumstances is that cause of action different,  
14 putting aside punitive damages, than the state  
15 law claims that would have been brought?

16           MR. MCGILL: A -- family member who  
17 was in Pennsylvania -- who lived in  
18 Pennsylvania, for instance, had no claim for  
19 compensatory damages under --

20           JUSTICE KAGAN: Because?

21           MR. MCGILL: By dint of Pennsylvania  
22 state law. That just -- that that --  
23 Pennsylvania state tort law did not allow that  
24 person to recover. Same for Louisiana.

25           And this was, you know, Judge Lamberth

1 in the Peterson case expressed some regret about  
2 this.

3 JUSTICE KAGAN: Got it.

4 MR. MCGILL: But -- but -- so that was  
5 part of the rationale for the federal cause of  
6 action.

7 JUSTICE KAGAN: Got it.

8 MR. MCGILL: There are two, at least  
9 two other points that I think demonstrate  
10 Congress's clear intent that punitive damages  
11 apply retroactively.

12 First is the prior actions provision,  
13 which for qualifying cases provided not only  
14 that an action could be restored under the new  
15 Section 1605A but also that the judgment itself  
16 shall be given effect as if it had been  
17 originally filed under 1605A(c).

18 And prior to 2004, many courts in D.C.  
19 had awarded punitive damages in cases under the  
20 Flatow Amendment. One of those cases was a case  
21 called Acree versus Iraq that this Court  
22 addressed in Iraq versus Beaty, it was a 959  
23 million dollar judgment that included 300  
24 million dollars of punitive damages.

25 And then President Bush's veto

1 statement, which you can find at the blue brief  
2 at 17(a) complains that this -- that the  
3 legislation that Congress had enacted would  
4 revive a 959 million dollar judgment against  
5 Iraq for the misdeeds of Saddam Hussein. That  
6 is an unmistakable reference to the Acree  
7 decision.

8           And what Congress did in response was  
9 not change anything with respect to the  
10 retroactivity of the cause of action or  
11 retroactivity generally or to punitive damages  
12 specifically. It instead gave the President  
13 waiver authority solely with respect to Iraq.

14           It demonstrates that the President  
15 knew that this statute provided for punitive  
16 damages to apply retroactively, and Congress's  
17 reaction to that was to say yes, we want -- we  
18 want punitive damages here to apply  
19 retroactively.

20           An additional point I would make  
21 that's related is that under the Flatow  
22 Amendment, ever since its enactment in 1996, it  
23 had always been applied to allow for punitive  
24 damages for past acts of terrorism, including in  
25 the case involving Lisa Flatow herself.

1           There is just no reason to think that  
2 Congress in 2008 wanted to narrow the relief  
3 that had been available under the Flatow  
4 Amendment. This was instead, if you look at the  
5 history of how Congress has dealt with the  
6 terrorism exception going back to 1996, it is  
7 consistently an effort to expand, not always  
8 perfectly effective effort, but it's an effort  
9 to expand the relief available to victims of  
10 terrorism.

11           There's no reason to think that after  
12 enacting the Flatow Amendment and providing  
13 punitive damages that looked backwards, that now  
14 Congress would provide a different punitive  
15 damages remedy that looked only forward.

16           It also, of course, would ignore the  
17 acts of terrorism that were most in Congress's  
18 mind at the time, which included, of course,  
19 this bombing here.

20           One additional point I could make that  
21 further demonstrates that this would apply  
22 retroactively is the operation of the related  
23 actions provision. And as the D.C. Circuit  
24 recognized in an opinion by then Judge  
25 Kavanaugh, the -- that related actions provision

1 allows a person who already has a judgment for  
2 compensatory damages to file a new action under  
3 the new federal cause of action to seek punitive  
4 damages.

5           The only reason Congress would allow  
6 somebody to bring a second cause of action  
7 arising out of the same act of terrorism would  
8 be to allow that person to provide -- to get the  
9 punitive damages that Congress, once again, was  
10 attempting to provide.

11           So you have the text of the statute,  
12 the history of the statute, and the context in  
13 which it arose, all here together, work -- work  
14 together to persuasively demonstrate that  
15 Congress wanted punitive damages to apply to  
16 past acts of terrorism.

17           Sudan, again, concedes that the  
18 federal cause of action for money damages  
19 applies retroactively. They concede that the  
20 federal cause of action for solatium, for pain  
21 and suffering, and economic damages all apply  
22 retroactively.

23           JUSTICE GINSBURG: This is an aside to  
24 the issue here, but I have not seen the term  
25 solatium as a -- as an item of damages before.

1 Where does that come from?

2 MR. MCGILL: I don't know where it  
3 comes from originally, but it -- I think it --  
4 it refers to the -- the emotional suffering of  
5 an aggrieved family member who is not themselves  
6 directly -- that -- that the injury that, for  
7 instance, a spouse suffers from -- from viewing  
8 their -- their spouse or their -- their other  
9 family member suffering through an injury.

10 JUSTICE ALITO: What about the  
11 retroactivity of punitive damages under state  
12 law?

13 MR. MCGILL: So I think there, if the  
14 Court agrees with me that -- that the federal  
15 remedy -- that the punitive damages applies  
16 retroactively under the federal cause of action,  
17 then the state law cause -- then it applies --  
18 the D.C. Circuit's decision with respect to  
19 state -- the state law cause of action really  
20 collapses.

21 The D.C. Circuit's primary rationale  
22 was that it would be inconsistent to allow state  
23 law punitive damages and not -- if you had  
24 already decided that the federal law doesn't,  
25 you know, doesn't provide for punitive damages,



1 and it was that -- what it said, inconsistent  
2 outcomes at page 129 of the petition appendix  
3 that really drove the decision.

4 Two additional points I would make is,  
5 first, the D.C. Circuit recognized that without  
6 the Landgraf presumption, then the amendment  
7 would have lifted the restriction as to state  
8 law punitive damages. So if you agree with us  
9 and the government that Altmann is the right  
10 framework as to which to -- to look at the state  
11 law issue, then under the D.C. Circuit's own  
12 rationale, the state law punitive damages should  
13 apply.

14 And I guess the third point I would  
15 make is that once you acknowledge and concede  
16 that these state law claims are brought under  
17 Section 1605A, and it should be emphasized that  
18 Petitioner's claims here have only ever been  
19 claims under Section 1605A.

20 They all were filed after the  
21 enactment of this statute originally. So once  
22 you concede that the actions are under 1605A,  
23 Section 1606 has no application to them. The  
24 1606 bar on punitive damages, as the D.C.  
25 Circuit says, at 128A of the petition appendix,

1 it has 1606, therefore, has no bearing upon  
2 state law claims brought under the  
3 jurisdictional grant in Section 1605A. That is  
4 us. That is our claims.

5 And if they -- without Section 1606,  
6 there is no other textual basis to bar punitive  
7 damages of a state law claim. There is no --  
8 there is no free-floating preemption of state  
9 law punitive damages that could be invoked.

10 So I think if you agree with us about  
11 the federal law cause of action, then the state  
12 law cause of action goes with it.

13 If there are no further questions.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Ms. Ross.

17 ORAL ARGUMENT OF ERICA L. ROSS FOR THE  
18 UNITED STATES, AS AMICUS CURIAE,  
19 SUPPORTING THE PETITIONERS

20 MS. ROSS: Mr. Chief Justice and may  
21 it please the Court:

22 If I could start this morning with  
23 Justice Alito's question about a magic words  
24 requirement, we of course agree with Petitioners  
25 that -- or with Petitioners that Landgraf

1 doesn't require that. And I think it's very  
2 important on page 272 of Landgraf where the  
3 Court explains exactly what it is doing.

4           It states that requiring clear intent  
5 assures that Congress itself has affirmatively  
6 considered the potential unfairness of  
7 retroactive application and determined that it  
8 is an acceptable price to pay for the  
9 countervailing benefit.

10           I think that that is exactly what  
11 happened here for all of the reasons that Mr.  
12 McGill has already explained. We have a statute  
13 where Congress in the first instance says under  
14 1605A(c) that punitive damages will be available  
15 in a laundry list of damages that it  
16 specifically identifies.

17           It then goes in Section 1083(c), and  
18 this is on page 26A of our appendix, through the  
19 actions that will be brought under 1605A, it  
20 explains that the amendments to Section 1605A  
21 will apply in any action, and it provides for  
22 prior actions that are related to  
23 previously-filed actions, so actions that are  
24 necessarily dependent on pre-enactment conduct,  
25 to be brought directly under Section 1605A.

1 CHIEF JUSTICE ROBERTS: If Landgraf is  
2 -- if Landgraf is a sort of substantive  
3 interpretive canon that is based on  
4 constitutional concern, why would it apply at  
5 all in a case involving a foreign sovereign?

6 And if it's not such a substantive  
7 canon, it would have to be an interpretive canon  
8 that Congress generally doesn't want to impose  
9 liability retroactively on a foreign state.  
10 Would there be any basis for that?

11 MS. ROSS: So I think it is a canon of  
12 congressional intent. I don't know that it's as  
13 closely tied to or limited to constitutional  
14 concerns, so much as simply a concern that when  
15 -- generally when Congress acts in a substantive  
16 manner, we think that it does so prospectively.

17 And I think if you thought that it  
18 simply had no application to foreign sovereigns,  
19 I think Altmann would have been written very  
20 differently. I think page 695 in footnote 15 of  
21 Altmann make very clear that the Court, while  
22 considering Landgraf not particularly  
23 appropriate in the context of foreign sovereign  
24 immunity and related issues that were then part  
25 of the FSIA, very clearly and self-consciously

1 carved out situations in which you are imposing  
2 new liability for the first time.

3 And this actually takes me to Justice  
4 Kagan's question, which I also was hoping to  
5 address. The -- it -- it is true, as Mr. McGill  
6 points out, that the compensatory damages were  
7 not available for all victims under prior law.  
8 I think it's also important to note that I don't  
9 read Landgraf as asking necessarily whether any  
10 other source of law would have provided for that  
11 same set of damages. I read it as asking  
12 whether this federal cause of action in that  
13 case and -- and here would provide for that type  
14 of liability.

15 And I think that's important because  
16 you can imagine in a case, particularly in a  
17 case involving a foreign sovereign, where you  
18 would then have to do that analysis across many,  
19 many different types or bodies of law across  
20 different countries, as well as in the state and  
21 the -- the federal context.

22 It's also not clear to me -- and this  
23 goes to Justice Ginsburg's question -- whether  
24 types of damages that are specifically  
25 enumerated in 1605A(c) like solatium necessarily

1 would have been available under state law  
2 previously. And so no one has sort of done that  
3 analysis. And I don't think that's necessarily  
4 the right way to think about the question here.

5 I think the -- the back-and-forth  
6 between Congress and the President that  
7 Mr. McGill mentioned earlier is extremely  
8 important here for two reasons. One, of course,  
9 is that, as Mr. McGill noted, it's very, very  
10 similar -- the language here is very similar to  
11 the prior bill that Landgraf had discussed. And  
12 so I think we can sort of take note of that.

13 Obviously, Landgraf also, by looking  
14 at that prior bill and the veto of that prior  
15 bill, sort of provides a guidepost that that is  
16 the -- the correct type of history to look at in  
17 this clear statement inquiry.

18 JUSTICE SOTOMAYOR: Ms. Ross, I'm --  
19 I'm trying to process everything you've just  
20 said --

21 MS. ROSS: Sorry.

22 JUSTICE SOTOMAYOR: -- but break it  
23 down in a more direct way.

24 MS. ROSS: Sure.

25 JUSTICE SOTOMAYOR: Your colleague

1 said that we don't have to get into the  
2 Landgraf/Altmann issue, that we can just see the  
3 plain language of the statute and say  
4 whatever -- however we look at it through the  
5 Landgraf lens or the Altmann lens, Congress was  
6 clear: Punitive damages apply retroactively in  
7 this case.

8 Do you agree with that proposition?

9 MS. ROSS: I do, Your Honor, with  
10 respect to the federal aspect.

11 JUSTICE SOTOMAYOR: All right. Now we  
12 go back to what Justice Alito asked you, and I  
13 want to clarify what you think the answer is to  
14 this.

15 Assuming it was a little less clear,  
16 are you saying Altmann -- Altmann would say that  
17 there is no presumption in a case involving  
18 foreign sovereigns, that Landgraf is only a  
19 presumption that applies to private rights, not  
20 to actions against foreign sovereigns?

21 MS. ROSS: No, Your Honor, we think  
22 that Landgraf would apply. We just simply think  
23 that it is satisfied here.

24 And, again, I apologize if I have --

25 JUSTICE SOTOMAYOR: I'm sorry, I know

1 your adversary takes a different tact. So I  
2 wasn't sure. Okay.

3 MS. ROSS: Correct.

4 JUSTICE SOTOMAYOR: Yes.

5 MS. ROSS: Petitioners think that you  
6 can apply Altmann across the board. We do think  
7 that Landgraf is the right framework for the  
8 federal cause of action, although we think  
9 Altmann is the correct --

10 JUSTICE SOTOMAYOR: You don't -- you  
11 don't believe that it's only to private rights;  
12 you believe it's to any retroactivity questions?

13 MS. ROSS: Well, no. I mean, of  
14 course we would -- we would carve out Altmann  
15 itself, which was a retroactivity question.

16 JUSTICE SOTOMAYOR: But on immunity?

17 MS. ROSS: On immunity. Exactly, Your  
18 Honor.

19 JUSTICE SOTOMAYOR: All right.

20 MS. ROSS: And we think that that's  
21 why Altmann, in fact, applies to the state law  
22 claims, because all Congress did with respect to  
23 the state law claims was adjust the extent to  
24 which United States courts are open to  
25 plaintiffs with preexisting claims. That's the



1 language that Congress used, essentially, to  
2 describe the then current state of the FSIA in  
3 2004, and we think it's still true with respect  
4 to the state law claims today, because  
5 plaintiffs would be proceeding, obviously, under  
6 state law and so section 1605A(a), which is the  
7 -- the exception to foreign sovereign immunity,  
8 and section 1606, which is the provision that  
9 previously barred punitive damages, neither of  
10 those create liability for punitive damages in  
11 the first instance.

12           Again, they simply alter the extent to  
13 which plaintiffs who otherwise could obtain that  
14 remedy in -- under state causes of action can do  
15 so in federal and state courts following the  
16 2008 amendments.

17           JUSTICE ALITO: If Congress thought  
18 that a particular country was an incorrigible  
19 sponsor of terrorism and it wanted to punish  
20 that country, would there be any constitutional  
21 barrier to Congress simply expropriating all  
22 assets of that country within the reach of the  
23 -- of the United States?

24           MS. ROSS: Your Honor, the United  
25 States hasn't taken a position on the scope of a

1 foreign state's constitutional rights in this  
2 case. Sudan hasn't raised that issue. Sudan  
3 has asked, like any other litigant, for  
4 application of the Landgraf presumption. It has  
5 not suggested that there would be some  
6 particular constitutional violation as to it.

7 I think, particularly in this context,  
8 where we have a narrow provision focused on  
9 state sovereign -- or state sponsors of  
10 terrorism that have been designated as such  
11 based on a congressional -- several  
12 congressional statutes that permit that  
13 designation, and then an executive determination  
14 about their sponsorship of terrorism, there  
15 really aren't any constitutional issues in this  
16 case.

17 JUSTICE ALITO: But you think that  
18 Landgraf applies in exactly the same way to a  
19 claim by -- when the -- when the defendant is a  
20 foreign state as it does when the defendant is a  
21 private party?

22 MS. ROSS: I think that, again, we --  
23 we haven't had a need to address that here  
24 because I think Landgraf requires that Congress  
25 be clear. I think for the textual and

1 contextual reasons that have already been  
2 discussed this morning, Congress was  
3 exceptionally clear.

4 I also think that that is -- the --  
5 the notion that it would apply in the same way  
6 or at least that it does apply to this very  
7 narrow circumstance of the creation of a new  
8 cause of action against a foreign state is a  
9 pretty clear sort of lesson from Altmann itself.

10 And, again, Altmann having been very  
11 clear to carve out the situation in which a new  
12 cause of action is created, obviously there, it  
13 was thinking about foreign sovereigns more  
14 generally.

15 JUSTICE ALITO: I mean, is the idea  
16 that if a -- if a foreign state is going to  
17 sponsor terrorism, it might think, well, you  
18 know, if we're going to be liable for  
19 compensatory damages, it's worth our while, but  
20 if we're going to get hit with punitive damages,  
21 well, that's going to stop us? Is that the --  
22 the thinking of the U.S. Government?

23 MS. ROSS: I don't think that that's  
24 the thinking of the U.S. Government, Justice  
25 Alito. I think what -- what is the thinking of

1 the U.S. Government is twofold.

2           One is that Landgraf, I think, doesn't  
3 just apply in situations -- and some of the  
4 subsequent decisions actually make this clear --  
5 it doesn't just apply in situations where  
6 someone is sort of consciously thinking should I  
7 take this act or shouldn't I. It embodies a  
8 more baseline fairness expectation, an  
9 expectation simply about how we think Congress  
10 thinks about these issues.

11           We generally think that when Congress  
12 legislates, it does so prospectively. And so if  
13 it's going to do so in a way that really affects  
14 substantive liabilities, it should be clear, and  
15 we think, again, here, it was quite clear, and  
16 we think that that's enough to resolve this case  
17 on -- as I said, on the federal cause of action.

18           And then, on the state cause of  
19 action, we think that clearly falls under  
20 Altmann and, for the reasons provided, we -- we  
21 think satisfies that more lenient test.

22           If the Court has no further questions,  
23 we would ask that you reverse.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Mr. Curran.

2 ORAL ARGUMENT OF CHRISTOPHER M. CURRAN

3 ON BEHALF OF THE RESPONDENTS

4 MR. CURRAN: Mr. Chief Justice, and  
5 may it please the Court:

6 First, a response to my friend  
7 Mr. McGill's opening histrionics, I note that  
8 the D.C. Circuit concluded that the -- that the  
9 evidence at the default hearing failed to show  
10 that Sudan either specifically intended or  
11 directly advanced the 1998 embassy bombings.

12 The D.C. Circuit also acknowledged  
13 that Sudan expelled Bin Laden permanently in  
14 1996, May of 1996, two years before the U.S.  
15 designated Bin Laden and Al Qaeda as terrorists.

16 So I think that some of Mr. McGill's  
17 comments have some selective 20/20 hindsight  
18 aspect to them. Now --

19 JUSTICE GINSBURG: Is that before us?

20 MR. CURRAN: I'm just responding to  
21 the -- the argument that Sudan is the devil  
22 incarnate here. I -- I think instead the record  
23 shows that Sudan, at most, was negligent in  
24 controlling people within its borders and that  
25 it's not -- and I want to make it clear that

1 Sudan did not and is not accused of being a  
2 terrorist, but instead providing an environment  
3 that allowed terrorism to foster, again, long  
4 before Bin Laden was a notorious terrorist.

5 Now, before I turn to the  
6 retroactivity issues that are before the Court,  
7 Justice Ginsburg, one comment about the state  
8 law claims that Justice Alito raised.

9 The state law claims are all brought  
10 by foreign national family members, so those --  
11 that's citizens of Kenya and Tanzania. They're  
12 all for claims of emotional distress felt by  
13 those plaintiffs. These are not representative  
14 claims of any kind.

15 Now, those claimants acknowledge, they  
16 concede that they are not eligible for the cause  
17 of action under 1605A(c) because they don't have  
18 the sufficient U.S. nexus; they're not U.S.  
19 nationals, they're not U.S. employees, they're  
20 not U.S. contractors, and they're not  
21 representatives of those.

22 So --

23 JUSTICE GINSBURG: But their decedents  
24 were?

25 MR. CURRAN: But their decedents were.

1 But these are not claims on behalf of the  
2 decedents. These are claims for the emotional  
3 injuries of these foreign family members  
4 themselves.

5 So if they're not eligible under 1605  
6 capital -- 1605A(c), under the cause of action,  
7 they are also not eligible under the exception  
8 to immunity because that's got parallel, almost  
9 identical, U.S. nexus requirements.

10 The bottom line is there's no subject  
11 matter jurisdiction as to claims by foreign  
12 national family members seeking redress for  
13 their own emotional injuries.

14 So if the Court were to expand the  
15 question presented, as my friends suggest, the  
16 conclusion should be that those state law claims  
17 cannot withstand scrutiny under subject matter  
18 jurisdiction.

19 Now, turning to the key retroactivity  
20 point, here our position, of course, is Landgraf  
21 controls this case. Altmann is not on point  
22 because when Altmann was decided, the FSIA was  
23 strictly a jurisdictional statute, essentially.

24 I do know it was complicated by the  
25 Verlinden decision, which said it established

1 some substantive aspects of federal common law.  
2 But, in any event, Altmann was limited to the  
3 FSIA as it existed at the time, and that was  
4 pre-2008.

5           Footnote 15 of Altmann and the text  
6 accompanying that specifically say that we're  
7 not dealing here in Altmann with a cause of  
8 action, the creation of a cause of action or the  
9 modification of a cause of action, because if we  
10 were, we'd have to be concerned with Landgraf  
11 and Landgraf's progeny, including the Hughes  
12 case.

13           JUSTICE KAGAN: Well, Mr. Curran,  
14 assuming Landgraf controls, why isn't it met  
15 here? I mean, you've conceded that every other  
16 part of this statute applies retroactively.

17           So how is it that you can exempt  
18 punitive damages from that retroactive coverage?

19           MR. CURRAN: Okay. There's a lot to  
20 that question. And I -- and I -- and I have an  
21 answer for all of it. First, with respect to  
22 your earlier point, yeah, we do concede that the  
23 compensatory damages and other -- certain other  
24 aspects of relief, including solatium, those --  
25 those do apply retroactively but not because



1 there's a clear statement by Congress that those  
2 should apply retroactively.

3 It's because there was no change, no  
4 substantial change. The -- the foreign states  
5 were already subject to compensatory damages and  
6 solatium. And --

7 JUSTICE KAGAN: Well, Mr. McGill said  
8 sometimes there was. And -- and it would be a  
9 matter of state law. You would have to go state  
10 by state and see what a particular state law had  
11 allowed and what it didn't. And that couldn't  
12 be what Congress had in mind, is, I think, Mr.  
13 McGill's and Ms. Ross's argument.

14 MR. CURRAN: Right. So Mr. McGill  
15 identified two states, Louisiana and  
16 Pennsylvania, that don't provide for IIED  
17 claims, emotional distress claims for  
18 non-present family members, okay?

19 So those are two outlier states. I'm  
20 not aware that we have got any plaintiffs in  
21 this case from Pennsylvania or Louisiana.  
22 And -- and, furthermore, that's secondary.

23 We -- our position is the family  
24 members don't have a claim at all before or  
25 after the 2008 amendments.

1 JUSTICE GORSUCH: But, Mr. Curran,  
2 just to try and pursue this question a little  
3 bit further, I thought you had conceded as well  
4 that 1605A's cause of action applies  
5 retroactively, the federal cause of action does.

6 MR. CURRAN: Yes, yes. Because --

7 JUSTICE GORSUCH: Okay. And that's a  
8 new cause of action, you'd agree, right?

9 MR. CURRAN: Well, it's new as a  
10 matter of federal law.

11 JUSTICE GORSUCH: Right. That's --  
12 that's how we usually define causes of action  
13 is, you know --

14 MR. CURRAN: Okay, but --

15 JUSTICE GORSUCH: -- is there a source  
16 of law that provides --

17 MR. CURRAN: -- there is a point.

18 JUSTICE GORSUCH: May I finish,  
19 please?

20 MR. CURRAN: I'm sorry.

21 JUSTICE GORSUCH: That's all right.  
22 So, and this is just the heart of the matter.  
23 And -- so take your time with it. And there is  
24 no rush.

25 But I think this is the heart of the

1 matter for me, and it sounds like it may be for  
2 some of my colleagues. If we agree that the  
3 cause of action is a new one and applies  
4 retroactively, and if we agree that compensatory  
5 damages apply retroactively, on what account  
6 does it make sense to speak of punitive damages  
7 not also applying retroactively, given that it's  
8 authorized by the same statute?

9 MR. CURRAN: Yeah, the answer to that  
10 lies in this Court's analysis of the Bradley  
11 case, within Landgraf and within Altmann.

12 Okay, Bradley was a case where there  
13 were -- there was an entitlement to attorneys'  
14 fees under common law.

15 And then a statute was passed  
16 authorizing attorneys' fees. And the question  
17 was: Well, should that new statute apply  
18 retroactively or not? No clear statement by  
19 Congress. But different regimes.

20 And the Court concluded, this Court  
21 concluded that we're going to apply the statute  
22 retroactively because there's not really a -- a  
23 retroactive effect for -- for the passage of  
24 that statute because attorneys' fees were  
25 already available under common law. So --

1 JUSTICE GORSUCH: Right. Let's say I  
2 don't buy that argument, and the mere fact that  
3 there were state causes of action doesn't move  
4 me very much.

5 And I'm still here, though, on -- on a  
6 record in which everyone agrees that the federal  
7 cause of action does apply retroactively. Then  
8 what do I do?

9 MR. CURRAN: Well, I might change my  
10 concession as to the federal cause of action, if  
11 -- if the state -- if the prior state cause of  
12 action was irrelevant?

13 JUSTICE GORSUCH: Can we do that at  
14 this stage, Mr. Curran?

15 MR. CURRAN: Well -- well, I don't  
16 know. But under -- I don't know if this is  
17 directly responsive to your question, but  
18 there's no clear statement here as to  
19 retroactive effect of any of this stuff in 2008.

20 So my friends point to 1083(c) and its  
21 provisions on pending cases. Well, this is an  
22 important point to make. None of the cases  
23 we're talking about here today were pending at  
24 the time two -- the 2008 statute was enacted.

25 As we say on page 13 of our brief,

1 three of the cases were filed in 2008, after the  
2 2008 enactment. And the fourth case, the Opati  
3 case, which we referred to on page 14 of our  
4 brief, was filed in 2012.

5 So none of the cases at issue in this  
6 case were pending cases. So I submit --

7 JUSTICE GINSBURG: I thought you were  
8 really -- I thought it was a given that you were  
9 contesting the retroactivity only of punitive  
10 damages, not the basic cause of action, not the  
11 compensatory damages, not pain and suffering,  
12 not solatium, I -- and now you seem to be  
13 waffling or reneging on that concession.

14 MR. CURRAN: No. So -- so - so here  
15 -- here's my analysis, right? Landgraf first  
16 asks did Congress specify clearly whether  
17 there's retroactive effect or not?

18 If Congress has said so, we apply  
19 that. But if Congress hasn't said so, then the  
20 next step in the Landgraf analysis is: Well, we  
21 have to take a look and see whether this new  
22 provision has a retroactive operation.

23 Does it upset settled expectations?  
24 Does it impose new damages? Does it impose a  
25 disability to use Justice Story's terminology?

1           And -- and in -- in the -- with  
2     respect to compensatory damages and with respect  
3     to the cause of action, with all due respect to  
4     Justice Gorsuch's disagreement on this point,  
5     those -- those things existed before the 2008  
6     enactment.

7           JUSTICE GORSUCH: Well, we often say  
8     there's a state tort cause of action that  
9     doesn't necessarily mean there's a federal civil  
10    rights cause of action, right?

11          MR. CURRAN: True, but here there's no  
12    space between --

13          JUSTICE GORSUCH: So, hey, federal law  
14    can provide the exact same remedy that state law  
15    can. That doesn't mean they are the same cause  
16    of action, does it?

17          MR. CURRAN: Well, I think under  
18    Landgraf and under Bradley, what we look for is  
19    the practical consequences. Is there  
20    fundamental unfairness in implying -- in  
21    applying retroactively the new provision?

22                 And here there's not, as to  
23    compensatory damages and the cause of action.

24          JUSTICE ALITO: I don't know where  
25    your argument based on these state claims is

1 going. Suppose that there was no federal cause  
2 of action for something, but there was a state  
3 cause of action for exactly the same thing.

4 And so now Congress passes a statute  
5 that creates the federal cause of action, which  
6 is exactly parallel to the preexisting state  
7 cause of action, but says nothing whatsoever  
8 about retroactivity.

9 Would you say that there is no  
10 retroactive effect in the case of the federal  
11 statute because you -- you were already liable  
12 under the state law?

13 MR. CURRAN: That's exactly what I'm  
14 saying, yes. There's -- there's no --

15 JUSTICE ALITO: I think you're arguing  
16 in exactly the opposite direction. So you would  
17 say there is no retroactive effect under the  
18 state -- under the federal -- we would presume  
19 that there would be no retroactive application  
20 -- that there would be --

21 MR. CURRAN: No.

22 JUSTICE ALITO: -- no problem with  
23 retroactive application of the federal claim  
24 because you were already liable under the state  
25 law.

1           MR. CURRAN: Right, that's the proper  
2 application of Landgraf. In -- under Landgraf  
3 the presumption against retroactivity doesn't  
4 kick in, unless the new statute has a  
5 retroactive effect. That has to operate  
6 retroactively.

7           There has to be prejudice to the  
8 subject of the statute before the presumption  
9 kicks in.

10          JUSTICE KAGAN: Well, what --

11          JUSTICE BREYER: Suppose you're right.

12          JUSTICE KAGAN: -- does that mean we  
13 have --

14          JUSTICE BREYER: Suppose you're right  
15 that -- I mean, we take all this, you say, look,  
16 go read 1605 whatever it is, whatever it is --  
17 (c)(2), and it says, with respect to any action  
18 that was brought under 1605(a)(7), on motion,  
19 the judge -- it -- shall -- it's treated, it  
20 shall be given effect, as if the action had  
21 originally been filed under 1605A(c).

22          Now, when you look at the effect, as  
23 if it had been brought under 1605A(c), we get  
24 all these things like economic damages,  
25 dah-dah-dah-dah-dah, and punitive damages, all



1 right?

2           So I'll make every assumption you  
3 want. The assumption is that all those things  
4 except for the word "punitive damages" were  
5 already part of what the defendants were facing.  
6 The only new one is punitive damages.

7           So we're talking about a retroactive  
8 effect of the two words in this statute which --  
9 called punitive damages, which didn't face the  
10 plaintiffs -- the defendant before. All right?  
11 Fine.

12           Now, if that's so, why isn't it still  
13 clear?

14           MR. CURRAN: Well, there's no  
15 reference to punitive -- you -- you -- you  
16 summarized accurately 1083(c)(2). There's no  
17 reference there to punitive damages. There's no  
18 reference to the retroactivity --

19           JUSTICE BREYER: No, all there is, is  
20 the word "as if."

21           MR. CURRAN: Right.

22           JUSTICE BREYER: And it says "as if"  
23 the action had originally been filed under  
24 1605A(c), okay? So if it had been originally  
25 filed under 1605A(c), you would have -- when

1 you're looking to the damage, what damages shall  
2 I give, said the judge? Well, read the words,  
3 economics, solatium, pain, suffering, and  
4 punitive damages.

5 MR. CURRAN: This Court's decisions,  
6 Landgraf and the progeny, they all say that  
7 there has to be a clear statement of  
8 retroactivity.

9 JUSTICE BREYER: Well, isn't this  
10 clear?

11 MR. CURRAN: That's not clear.

12 JUSTICE BREYER: It's clear because it  
13 says "as if." It's like if Socrates is a man,  
14 you know, what is that -- all men are mortal; if  
15 Socrates is a man, Socrates is mortal.

16 It says all actions brought under  
17 1605A, it shall be treated as if --

18 MR. CURRAN: Right. So -- so --

19 JUSTICE BREYER: -- it is 1605, and to  
20 treat it under 1605A(c), you give punitive  
21 damages.

22 MR. CURRAN: Right. So, again --

23 JUSTICE BREYER: So maybe Socrates  
24 wasn't mortal, but I thought he was.

25 (Laughter.)

1 MR. CURRAN: Well, 1083(c)(2) --

2 JUSTICE BREYER: Yeah.

3 MR. CURRAN: -- applies only to  
4 pending cases, and it provides that by motion, a  
5 -- a party in a pending case, a plaintiff in a  
6 pending case --

7 JUSTICE BREYER: Yeah.

8 MR. CURRAN: -- can make -- can,  
9 therefore, basically transition its action from  
10 the prior version, which is 15 -- 16 --  
11 1605(a)(7), to the new federal cause of action.

12 So it's a transition. It says nothing  
13 about punitive damages being -- being applied.  
14 It says nothing about retroactivity. And this  
15 says --

16 JUSTICE BREYER: Yeah. It just says  
17 as if -- I mean, I don't want to repeat myself.

18 MR. CURRAN: So it's -- so it's  
19 putting -- so it's putting that transitioned  
20 plaintiff on the same footing as a  
21 fresh-filing --

22 JUSTICE BREYER: Yep.

23 MR. CURRAN: -- 1605A person.

24 JUSTICE BREYER: Yep.

25 MR. CURRAN: That -- that says nothing

1 about whether punitive damages should apply to  
2 pre-enactment conduct. And --

3 JUSTICE GINSBURG: There's something  
4 strange about the -- the whole discussion of  
5 retroactivity because the doctrine is supposed  
6 to be based on people having an opportunity to  
7 know what the law is and conform their conduct  
8 to it.

9 Are you maintaining that Sudan might  
10 have withheld their aid to Al Qaeda just to  
11 prevent exposure to punitive damages?

12 MR. CURRAN: This Court's cases are  
13 pretty clear saying that even as to conduct that  
14 was illegal or immoral, the -- the bad man  
15 under -- to use Justice Holmes's terminology, is  
16 still entitled to notice of what the law is.  
17 Maybe a -- a -- a country in the position of a  
18 Sudan knowing about the extra liability -- maybe  
19 they would have supervised their residents,  
20 their 40 million residents, a little more  
21 closely.

22 But -- but the -- but the law does  
23 presume that -- particularly in the case of  
24 punitive damages, that it's only fair to apply  
25 them if the party was on notice of its exposure

1 to that at the time of the relevant conduct. Is  
2 there --

3 JUSTICE BREYER: It's like a due  
4 process argument, and I guess if corporations  
5 are persons, maybe foreign countries are too. I  
6 don't know the answer to that.

7 JUSTICE GINSBURG: Is the --

8 MR. CURRAN: Well, this Court's said  
9 --

10 JUSTICE BREYER: But that isn't in  
11 front of us, is it?

12 And as far as the words "pending  
13 cases" are concerned, you fall within -- are you  
14 a pending case?

15 MR. CURRAN: Pardon me?

16 JUSTICE BREYER: Were you -- are your  
17 -- are these pending cases in your view?

18 MR. CURRAN: No, none of them are.

19 JUSTICE BREYER: They're not pending  
20 cases?

21 MR. CURRAN: Right. None are.

22 JUSTICE BREYER: It says with respect  
23 to any action that was brought under 1605(a)(7),  
24 yours was brought under --

25 MR. CURRAN: No.

1 JUSTICE BREYER: It wasn't? What was  
2 it brought under?

3 MR. CURRAN: They were all brought  
4 after the enactment in 2008. So they were all  
5 brought under 1605A. Page 13 of our brief.  
6 Every one of these actions was filed after the  
7 enactment in 2008. None were pending at the  
8 time of the enactment.

9 This Section 1083(c) that we're all  
10 talking about is irrelevant to these cases.

11 JUSTICE BREYER: Oh, I see. So your  
12 argument --

13 MR. CURRAN: You're looking in the  
14 wrong place.

15 JUSTICE BREYER: Let me see I have if  
16 right. Your argument is that 1605 -- this --  
17 that this section, 1605, is really about  
18 1605(a)(7) --

19 MR. CURRAN: Yes.

20 JUSTICE BREYER: -- and your cases are  
21 big A.

22 MR. CURRAN: Yes. And there's  
23 nothing -- you can look throughout all the 2008  
24 enactment, you will not see a whisper of a  
25 suggestion about the temporal application of

1 claims under 1605A. They don't exist. That's  
2 why my friends are resorting to the pending  
3 action transition provisions, which are  
4 irrelevant to what we're talking about.

5 JUSTICE BREYER: But that -- wouldn't  
6 that be a little weird? In other words, you  
7 brought it under 1605A before what's called the  
8 Flatow Amendment, is this -- I don't know what  
9 you're --

10 MR. CURRAN: No. It's all after  
11 Flatow.

12 JUSTICE BREYER: All right, wait --  
13 you're saying it's under A, and this latter  
14 thing, application of pending cases, is only  
15 small a.

16 MR. CURRAN: Right.

17 JUSTICE BREYER: So if, in fact, you  
18 filed the -- a case in 1899 and it's still  
19 pending, it's true in some courts --

20 (Laughter.)

21 JUSTICE BREYER: -- the -- the -- and  
22 you -- you -- then you wouldn't -- you would  
23 have punitive damages applied to that?

24 MR. CURRAN: No. I would --

25 JUSTICE BREYER: You filed --

1 MR. CURRAN: No. It still doesn't  
2 mention punitive damages. It still doesn't talk  
3 about retroactivity.

4 Landgraf sets a bar, and it's not just  
5 Landgraf; it's all the cases after it. It's  
6 Lindh. It's St. Cyr. All of these cases say if  
7 you're going to imply -- to -- to apply  
8 punishment --

9 JUSTICE BREYER: Um-hum.

10 MR. CURRAN: -- or significant  
11 increased damages retroactively, Congress, you  
12 got to say it pretty clearly. You got to say,  
13 as to the new punitive damages, those apply  
14 retroactively to pre-enactment conduct. It's  
15 not that hard to say. Congress can say it.

16 JUSTICE ALITO: Nothing short of -- of  
17 referring explicitly to punitive damages would  
18 be sufficient?

19 MR. CURRAN: I -- I think that's  
20 right. I think that's what "explicit" means and  
21 that's what "express" means in the Landgraf  
22 decision. Words like "express" and "explicit"  
23 are all over Landgraf.

24 Now, I do acknowledge that that -- in  
25 that footnote 8, where just Stevens was -- for



1 the Court, was writing about the 1990 Civil  
2 Rights Act, which wasn't passed, he identified  
3 that as a better and maybe sufficient way to  
4 show retroactive effect, but there, there was a  
5 cross-reference specifically to the damages  
6 provision. And it said that provision shall  
7 apply for cases on or before such and such a  
8 date.

9 With -- with all due respect to Mr. --  
10 my friend Mr. McGill, there's no close analogy  
11 between that provision in footnote 8 of Landgraf  
12 and what we're dealing with here. Here we have  
13 literally nothing talking about the retroactive  
14 effect of 1605A. Nothing.

15 JUSTICE KAGAN: Mr. Curran, if I could  
16 understand your position, are you saying that  
17 punitive damages was the only thing that was  
18 new, or are you saying -- are you conceding that  
19 there are some states where other sorts of  
20 damages and maybe some other liability rules  
21 were new, but that those get kind of swept into  
22 the mix and there is retroactive application of  
23 those?

24 MR. CURRAN: I'm not aware of any new  
25 exposure that 1605A imposed, other than punitive

1 damages.

2 JUSTICE KAGAN: Suppose Mr. McGill can  
3 tell us we found three states where there's no  
4 exposure. What happens to those?

5 MR. CURRAN: If there was no exposure  
6 in those states, and then now there is under the  
7 new federal cause of action, I think a foreign  
8 sovereign defendant has an argument that that is  
9 new, that is a new disability, that is a new  
10 punishment, and it shouldn't be applied  
11 retroactively without a clear statement by  
12 Congress. I think that's under Landgraf.

13 JUSTICE BREYER: I want to be sure I  
14 understand this, but you're saying, I think,  
15 look at 1605A.

16 MR. CURRAN: Yes.

17 JUSTICE BREYER: When you look at  
18 1605A, it does provide for punitive damages, but  
19 it doesn't say whether those punitive damages  
20 are retroactive.

21 MR. CURRAN: Correct.

22 JUSTICE BREYER: Now you look at --  
23 then you look at 1605A, application to pending  
24 cases. And you're saying as to that, it has  
25 nothing to do with this case, because this was

1 not a case that was brought under 1605(a)(7),  
2 which it has to do with? Is that right?

3 MR. CURRAN: I -- I'm not sure if I  
4 heard you right. All -- all of these --

5 JUSTICE BREYER: Is it -- it says with  
6 respect to any action that was brought under  
7 section 1605(a)(7)? Yeah. And that isn't  
8 yours?

9 MR. CURRAN: That -- that isn't ours.

10 JUSTICE BREYER: So that whole section  
11 doesn't apply --

12 MR. CURRAN: No. Right.

13 JUSTICE BREYER: -- and when we look  
14 at the section that does apply --

15 MR. CURRAN: Right.

16 JUSTICE BREYER: -- we see that it  
17 doesn't say anything about retroactivity.

18 MR. CURRAN: I'll -- I'll say it  
19 again.

20 JUSTICE BREYER: Is that it? Is that  
21 it?

22 MR. CURRAN: Yes. All four of these  
23 cases that we're dealing with in this case were  
24 filed after the enactment of the statute. None  
25 of them were pending.

1 JUSTICE ALITO: Is that a new  
2 argument? I thought -- are you saying that the  
3 federal cause of action does not apply  
4 retroactively at all?

5 MR. CURRAN: No, I'm not --

6 JUSTICE ALITO: Under the new federal  
7 cause of action all you can sue for are things  
8 that happened after the enactment of that  
9 provision?

10 MR. CURRAN: No, I'm saying that the  
11 new federal cause of action applies  
12 retroactively because under Landgraf's second  
13 step, it has no retro -- no practical  
14 retroactive operation.

15 JUSTICE GORSUCH: And if we disagree  
16 with that premise, you lose, right, because if  
17 we think that a federal cause of action adds in  
18 any way a material new potential liability,  
19 different statutes of limitations, for example,  
20 different elements of the cause of action,  
21 whatever, if we disagree with you and we think  
22 that a federal cause of action is separate and  
23 distinct from a state cause of action, you lose?

24 MR. CURRAN: No.

25 JUSTICE GORSUCH: Why not? How do you

1 prevail then?

2 MR. CURRAN: Because -- because if --  
3 if the federal cause of action is really a new  
4 disability, is really a new --

5 JUSTICE GORSUCH: Yeah.

6 MR. CURRAN: -- a new prejudice, then  
7 it requires an express statement by Congress --

8 JUSTICE GORSUCH: And you have --

9 MR. CURRAN: -- of retroactivity.

10 JUSTICE GORSUCH: And my  
11 understanding, though, is you've agreed that the  
12 retroactivity here is permissible, but you are  
13 saying that that -- that's -- that that -- maybe  
14 -- maybe I'm missing this. Maybe the missing  
15 argument is that -- that your concession is no  
16 longer valid at that stage.

17 MR. CURRAN: No, no, no. Oh, at that  
18 stage, right. If you change the premises of my  
19 concession, yes, my concession changes. But --  
20 but -- but my concession is premised on the very  
21 strong reality that the federal cause of action  
22 didn't add much to preexisting state causes of  
23 action.

24 JUSTICE SOTOMAYOR: Excuse me. Could  
25 I just clarify one step further?

1 MR. CURRAN: Please.

2 JUSTICE SOTOMAYOR: Let's assume that  
3 this had been filed earlier than the amendment,  
4 that it was -- that it goes back to or it was  
5 timely filed before.

6 Would you concede that 1605A(c) would  
7 make punitive damages retroactive as to that  
8 class of cases?

9 MR. CURRAN: I would not and I will  
10 tell you why.

11 JUSTICE SOTOMAYOR: All right. That's  
12 where now I'm getting lost. I followed you up  
13 to saying for new causes of action --

14 MR. CURRAN: Okay.

15 JUSTICE SOTOMAYOR: -- it's not clear.

16 MR. CURRAN: If 1083(c) was relevant  
17 because there was a pending case under  
18 1605(a)7 --

19 JUSTICE SOTOMAYOR: Exactly.

20 MR. CURRAN: -- then I still would say  
21 where is the express or explicit command of  
22 retroactivity for punitive damages and I don't  
23 find that in 1083(c).

24 JUSTICE BREYER: You have a stronger  
25 argument. I mean, you would say, look, if we

1 had filed this three years later, the punitive  
2 damages part wouldn't apply because this  
3 retroactivity -- the "as if" thing doesn't  
4 apply.

5 And so it can't be clear. It can't be  
6 clear to a preceding one when, although they  
7 refer to "as if," it doesn't make sense to apply  
8 retroactivity to the older cases and not to the  
9 newer cases.

10 And that itself creates an ambiguity.

11 MR. CURRAN: Right. Saying "as if"  
12 isn't enough. Saying --

13 JUSTICE BREYER: Well, that's a pretty  
14 -- I mean, you have to say something like that.  
15 And, boy, we're in outer space, I think, by the  
16 --

17 MR. CURRAN: Landgraf tells us the --  
18 the -- the notion of retroactive imposition of  
19 --

20 JUSTICE BREYER: Yeah.

21 MR. CURRAN: -- punitive damages is  
22 such a draconian step, it -- it is against --

23 JUSTICE BREYER: See, I've got that  
24 one.

25 MR. CURRAN: -- the basic principles

1 going back centuries about fairness.

2 So before we attribute that intention  
3 to Congress, we're going to ask Congress to say  
4 it pretty damn clearly.

5 JUSTICE KAGAN: So, Mr. Curran --

6 MR. CURRAN: That's all it says.

7 JUSTICE KAGAN: -- in your state of  
8 the world and if I understand it, it's not just  
9 punitive action, punitive damages now, it's  
10 really any new liability, any new damages.

11 So you're conceiving of a state of the  
12 world where a defendant foreign state gets to  
13 walk in and say, well, there's this new thing  
14 and that wouldn't have been true before, there  
15 is this new thing and that wouldn't have been  
16 true before, and -- and that's what it will all  
17 come down to, right?

18 And -- and, boy, that seems -- that  
19 seems awfully complicated and probably not what  
20 Congress had in mind, that somebody would say  
21 under Pennsylvania law it works like this.  
22 Under Wisconsin law it works like this. And  
23 then different people would be treated in  
24 different ways, depending on which state they  
25 were in.



1                   Could that make any sense?

2                   MR. CURRAN: Well, the -- first of  
3 all, these principles aren't just for foreign  
4 sovereigns. Right? This is for litigation writ  
5 large.

6                   JUSTICE KAGAN: Yeah.

7                   MR. CURRAN: Right? And -- and we're  
8 not taking a position that, oh, oh, the federal  
9 cause of action shouldn't apply retroactivity  
10 because of people in Pennsylvania. Look, we're  
11 not.

12                   We're taking a more practical approach  
13 to this, that, in general, the -- the federal  
14 cause of action adds nothing new. So it has no  
15 retroactive operation under Landgraf, therefore,  
16 it applies retroactively.

17                   This is what Landgraf says. So I --  
18 we're not asking for any change of the law.  
19 We're asking for equal-handed treatment of  
20 Sudan, on the same footing that other litigants  
21 would enjoy the presumptions and other -- other  
22 statements in Landgraf, but we're not asking for  
23 anything new or radical here.

24                   This case presents a straightforward  
25 application of the Landgraf steps. Is there --

1 is there a clear statement by Congress? If not,  
2 then we look and see whether there's a  
3 retroactive operation. If there is a  
4 retroactive operation, such as with punitive  
5 damages, then the presumption kicks in and --  
6 and the -- and the -- and the new provision  
7 cannot apply retroactively. That's it. We're  
8 not asking for anything radical here.

9           There are other arguments we make in  
10 -- in our briefs, including on subject matter  
11 jurisdiction. We invite the Court to consider  
12 those, including the one -- that that argues  
13 that the Helmerich decision of a couple of years  
14 ago has not been applied correctly here because  
15 the Court here found that -- applied a wrong  
16 standard for jurisdictional causation.

17           We also take issue with the idea that  
18 -- that this case involves an extrajudicial  
19 killing, because that's a specific term of art  
20 under international law. And we raise a series  
21 of other jurisdictional arguments that probably  
22 would require a remand or further briefing.

23           JUSTICE GINSBURG: Are they -- I know  
24 one is a limitation, statute of limitation  
25 question, which is an affirmative defense, not a

1 jurisdictional issue.

2 MR. CURRAN: Well, that -- that's the  
3 issue, Justice Ginsburg. The issue is whether  
4 the limitations defense is jurisdictional and,  
5 therefore, cannot be waived by a defaulting  
6 foreign sovereign or whether it is an  
7 affirmative defense that can be waived.

8 And our position is, given the  
9 placement and text of 1605A(b), that it should  
10 be interpreted to be jurisdictional so the court  
11 of appeals should have addressed it on the  
12 merits.

13 JUSTICE ALITO: Mr. -- Mr. McGill says  
14 that if your interpretation of extrajudicial  
15 killing is correct, then the terrorism exception  
16 doesn't apply to terrorism.

17 MR. CURRAN: Yeah, that -- that's --  
18 that's semantics.

19 JUSTICE ALITO: Well --

20 MR. CURRAN: If there is no question  
21 that the four predicate acts each constitute  
22 types of terrorism, okay, so -- so it's still  
23 the terrorism exception.

24 My question, my question to Mr.  
25 McGill, I guess, is how come Congress rejected

1 the -- the act of terrorism as it was proposed  
2 in the early versions of the -- of the terrorism  
3 exception?

4 JUSTICE ALITO: Well, which terrorists  
5 would be covered under your -- under your  
6 understanding? Only those who are -- are  
7 officially on the payroll of the state?

8 MR. CURRAN: No, no, agents and others  
9 engaging in the acts. Well, it depends -- it  
10 may depend on the predicate act, right, where  
11 there are four predicate acts. Two of them,  
12 extrajudicial killing and torture are acts under  
13 international law that can only be committed by  
14 state actors.

15 The other ones, aircraft sabotage and  
16 hostage taking, under those conventions, anyone,  
17 you don't have to be a state actor, but you can  
18 be guilty of the violation under international  
19 law. So it depends on the predicate act.

20 And -- and the ATA, right, we've got  
21 the antiterrorist act, which does criminalize  
22 and provide civil remedies for acts of  
23 international terrorism, that excepts foreign  
24 states.

25 So when one considers the broad

1 terrorism statutory scheme, one sees that acts  
2 of terrorism generally are prohibited and  
3 criminalized and provide for civil remedies, but  
4 not against a foreign state, but under the four  
5 predicate acts that are embedded in the  
6 terrorism exception, those are acts that  
7 Congress carefully considered with the advice of  
8 the State Department and concluded that those  
9 acts are all condemned universally by  
10 international law.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel. Three minutes, Mr. McGill.

14 REBUTTAL ARGUMENT OF MATTHEW D. MCGILL  
15 ON BEHALF OF THE PETITIONERS

16 MR. MCGILL: Thank you, Mr. Chief  
17 Justice.

18 Justice Breyer, let's start with what  
19 this case is. If you turn to 28(a) of the  
20 government's brief, you will see the provision  
21 for related actions. That's what these cases  
22 are.

23 A related action is -- is one which is  
24 -- where there is a -- a case that has been  
25 timely commenced under the old terrorism

1 exception, 1605a7, and that's the Owens case,  
2 filed in 2001, then any other action -- turn the  
3 page -- arising out of the same act or incident  
4 may be brought under 1605A. That is us.

5 We -- because we are related to Owens,  
6 we arise out of the same act or incident as  
7 Owens, we file under 1605A. What happens then?  
8 Under 1605A1 -- I'm -- I'm sorry, under  
9 1083(c)1, the amendments made by this section  
10 shall apply to any claim arising under Section  
11 1605A.

12 The amendments of 1083, therefore,  
13 apply to our claims. And at page 43, Sudan  
14 concedes that -- and I'm reading now --  
15 Section 1083(C)(1) simply provides that all the  
16 amendments under Section 1083 apply to a claim  
17 arising under Section 1605A.

18 All the amendments. That includes  
19 punitive damages.

20 JUSTICE BREYER: But he's saying -- I  
21 think he's saying, look at the -- look at the  
22 first -- look at 2(b)(a) in the application to  
23 pending cases. And he is saying with respect to  
24 any action brought under 1605a7 -- small a --  
25 that's where this retroactivity, that's where

1 the thing applies, and he says yours isn't.

2 MR. MCGILL: We're not -- we're --

3 JUSTICE BREYER: But you come to the  
4 related part.

5 MR. MCGILL: We're not a prior action.  
6 We're a related action.

7 JUSTICE BREYER: Arising out of the  
8 same -- -

9 MR. MCGILL: But 1605A applies to  
10 both. Prior actions is the Acree case. Prior  
11 actions are cases that already had punitive  
12 damages judgments that Congress said could be  
13 revived. Any judgment in the action shall be  
14 given effect as if it had been filed under  
15 1605A(c).

16 And it was for that reason that the  
17 President first vetoed it, and it was in  
18 response to the President's veto that Congress  
19 gives waiver authority with respect to Iraq.

20 JUSTICE SOTOMAYOR: Mr. McGill, the  
21 one argument that they make that I -- can we  
22 avoid reaching, is a subject matter  
23 jurisdiction, whether relatives of victims for  
24 their independent state tort actions fall within  
25 any of these statutes, because they all require

1 a U.S. nexus.

2 MR. MCGILL: Yes. So the -- the  
3 argument is that claimant in 1085 -- 1605A(a)  
4 means legal representative. That's their  
5 argument. That argument is wrong for several  
6 reasons.

7 First, it's contrary to the plain  
8 meaning of claimant. Second, claimant or victim  
9 was language added in a technical amendment in  
10 1997, and it was consistent -- may I --

11 CHIEF JUSTICE ROBERTS: You can get to  
12 third, and then --

13 MR. MCGILL: Consistently --  
14 consistently applied by lower courts for some 12  
15 years. And Congress legislated against that  
16 background, ratified that, and I'd cite the  
17 Inclusive Communities Project for that.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel. The case is submitted.

20 (Whereupon, at 12:11 p.m., the case  
21 was submitted.)

22

23

24

25



## Official - Subject to Final Review

<b>1</b>	<b>4</b>	<b>affirmative</b> [2] 57:25 58:7	<b>applying</b> [2] 34:7 37:21
<b>1083</b> [4] 8:22 9:4 61:12,16	<b>4</b> [1] 3:4	<b>affirmatively</b> [1] 18:5	<b>approach</b> [1] 56:12
<b>1083(c)</b> [6] 8:16 18:17 35:20 45:9	<b>40</b> [1] 43:20	<b>agents</b> [1] 59:8	<b>appropriate</b> [1] 19:23
<b>53:16,23</b>	<b>43</b> [2] 6:11 61:13	<b>aggrieved</b> [1] 15:5	<b>aren't</b> [2] 25:15 56:3
<b>1083(c)(1)</b> [2] 6:4 61:15	<b>6</b>	<b>ago</b> [1] 57:14	<b>argues</b> [2] 4:17 57:12
<b>1083(c)(2)</b> [2] 40:16 42:1	<b>60</b> [1] 3:14	<b>agree</b> [7] 16:8 17:10,24 22:8 33:8	<b>arguing</b> [1] 38:15
<b>1083(c)1</b> [1] 61:9	<b>695</b> [1] 19:20	<b>34:2,4</b>	<b>argument</b> [25] 1:17 3:2,5,9,12 4:4,
<b>1085</b> [1] 63:3	<b>8</b>	<b>agreed</b> [1] 52:11	<b>7 17:17 28:2,21 32:13 35:2 37:25</b>
<b>11:10</b> [2] 1:18 4:2	<b>8</b>	<b>agrees</b> [2] 15:14 35:6	<b>44:4 45:12,16 49:8 51:2 52:15 53:</b>
<b>12</b> [1] 63:14	<b>9</b>	<b>aid</b> [1] 43:10	<b>25 60:14 62:21 63:3,5,5</b>
<b>12:11</b> [1] 63:20	<b>A</b>	<b>aircraft</b> [1] 59:15	<b>arguments</b> [2] 57:9,21
<b>128A</b> [1] 16:25	<b>959</b> [2] 11:22 12:4	<b>AL</b> [6] 1:6,9 4:11 5:4 28:15 43:10	<b>arise</b> [1] 61:6
<b>129</b> [1] 16:2	<b>a.m</b> [2] 1:18 4:2	<b>ALITO</b> [18] 6:23 7:10 15:10 22:12	<b>arising</b> [7] 6:5,13 14:7 61:3,10,17
<b>13</b> [3] 4:15 35:25 45:5	<b>ability</b> [1] 7:1	<b>24:17 25:17 26:15,25 29:8 37:24</b>	<b>62:7</b>
<b>14</b> [1] 36:3	<b>able</b> [1] 9:9	<b>38:15,22 47:16 51:1,6 58:13,19</b>	<b>arose</b> [1] 14:13
<b>15</b> [3] 19:20 31:5 42:10	<b>above-entitled</b> [1] 1:16	<b>59:4</b>	<b>art</b> [1] 57:19
<b>16</b> [1] 42:10	<b>abundantly</b> [1] 5:19	<b>Alito's</b> [1] 17:23	<b>aside</b> [2] 10:14 14:23
<b>1605</b> [9] 30:5 39:16 41:19 45:16,17	<b>acceptable</b> [1] 18:8	<b>allow</b> [5] 10:23 12:23 14:5,8 15:22	<b>asks</b> [1] 36:16
<b>1605(a)(7)</b> [7] 9:9 39:18 42:11 44:	<b>accompanying</b> [1] 31:6	<b>allowed</b> [2] 29:3 32:11	<b>aspect</b> [2] 22:10 28:18
<b>23 45:18 50:1,7</b>	<b>account</b> [1] 34:5	<b>allows</b> [1] 14:1	<b>aspects</b> [2] 31:1,24
<b>1605(a)7</b> [1] 53:18	<b>accurately</b> [1] 40:16	<b>almost</b> [2] 8:18 30:8	<b>assets</b> [1] 24:22
<b>1605A</b> [26] 6:6,8,14 11:15 16:17,19,	<b>accused</b> [1] 29:1	<b>already</b> [10] 14:1 15:24 18:12 26:1	<b>Assistant</b> [1] 2:4
<b>22 17:3 18:19,20,25 41:17 42:23</b>	<b>acknowledge</b> [3] 16:15 29:15 47:	<b>32:5 34:25 38:11,24 40:5 62:11</b>	<b>assume</b> [1] 53:2
<b>45:5 46:1,7 48:14,25 49:15,18,23</b>	<b>24</b>	<b>alter</b> [1] 24:12	<b>Assuming</b> [2] 22:15 31:14
<b>61:4,7,11,17 62:9</b>	<b>acknowledged</b> [1] 28:12	<b>although</b> [2] 23:8 54:6	<b>assumption</b> [2] 40:2,3
<b>1605A's</b> [1] 33:4	<b>Acree</b> [3] 11:21 12:6 62:10	<b>Altmann</b> [20] 5:15 16:9 19:19,21	<b>assures</b> [1] 18:5
<b>1605A(a)</b> [2] 24:6 63:3	<b>across</b> [3] 20:18,19 23:6	<b>22:5,16,16 23:6,9,14,21 26:9,10</b>	<b>ATA</b> [1] 59:20
<b>1605A(b)</b> [1] 58:9	<b>act</b> [9] 14:7 27:7 48:2 59:1,10,19,	<b>27:20 30:21,22 31:2,5,7 34:11</b>	<b>attacks</b> [1] 4:25
<b>1605A(c)</b> [12] 11:17 18:14 20:25 29:	<b>21 61:3,6</b>	<b>ambiguity</b> [1] 54:10	<b>attempting</b> [1] 14:10
<b>17 30:6 39:21,23 40:24,25 41:20</b>	<b>action</b> [78] 9:13,20 10:4,12,13 11:6,	<b>amendment</b> [9] 5:1 11:20 12:22	<b>attorneys'</b> [3] 34:13,16,24
<b>53:6 62:15</b>	<b>14 12:10 14:2,3,6,18,20 15:16,19</b>	<b>13:4,12 16:6 46:8 53:3 63:9</b>	<b>attribute</b> [1] 55:2
<b>1605A1</b> [1] 61:8	<b>17:11,12 18:21 20:12 23:8 24:14</b>	<b>amendments</b> [11] 6:3,4,9,12 18:	<b>authority</b> [2] 12:13 62:19
<b>1605a7</b> [2] 61:1,24	<b>8,9 33:4,5,8,12 34:3 35:3,7,10,12</b>	<b>20 24:16 32:25 61:9,12,16,18</b>	<b>authorization</b> [1] 8:9
<b>1606</b> [5] 16:23,24 17:1,5 24:8	<b>36:10 37:3,8,10,16,23 38:2,3,5,7</b>	<b>amicus</b> [3] 2:6 3:7 17:18	<b>authorized</b> [1] 34:8
<b>17</b> [1] 3:8	<b>39:17,20 40:23 42:9,11 44:23 46:</b>	<b>ample</b> [1] 5:5	<b>authorizing</b> [1] 34:16
<b>17(a)</b> [1] 12:2	<b>3 49:7 50:6 51:3,7,11,17,20,22,23</b>	<b>analogy</b> [1] 48:10	<b>available</b> [7] 5:20 13:3,9 18:14 20:
<b>17-1268</b> [1] 4:4	<b>52:3,21,23 53:13 55:9 56:9,14 60:</b>	<b>analysis</b> [5] 5:16 20:18 21:3 34:10	<b>7 21:1 34:25</b>
<b>1899</b> [1] 46:18	<b>23 61:2,24 62:5,6,13</b>	<b>36:15,20</b>	<b>avoid</b> [1] 62:22
<b>1980</b> [1] 8:16	<b>actions</b> [19] 5:25 6:1,7,7 11:12 13:	<b>answer</b> [5] 10:11 22:13 31:21 34:9	<b>awarded</b> [1] 11:19
<b>1983</b> [2] 6:13 9:21	<b>23,25 16:22 18:19,22,23,23 22:20</b>	<b>44:6</b>	<b>aware</b> [3] 8:11 32:20 48:24
<b>1990</b> [2] 8:14 48:1	<b>41:16 45:6 60:21 62:10,11,24</b>	<b>antiterrorist</b> [1] 59:21	<b>awfully</b> [1] 55:19
<b>1993</b> [1] 4:23	<b>actor</b> [1] 59:17	<b>anyway</b> [1] 9:11	<b>B</b>
<b>1996</b> [5] 5:1 12:22 13:6 28:14,14	<b>actors</b> [1] 59:14	<b>apart</b> [1] 9:15	<b>back</b> [4] 13:6 22:12 53:4 55:1
<b>1997</b> [1] 63:10	<b>acts</b> [16] 5:3,22 6:2 12:24 13:17 14:	<b>apologize</b> [1] 22:24	<b>back-and-forth</b> [1] 21:5
<b>1998</b> [1] 28:11	<b>16 19:15 58:21 59:9,11,12,22 60:</b>	<b>appeals</b> [1] 58:11	<b>background</b> [1] 63:16
<b>2</b>	<b>1,5,6,9</b>	<b>APPEARANCES</b> [1] 2:1	<b>backwards</b> [1] 13:13
<b>2(b)(a)</b> [1] 61:22	<b>actually</b> [3] 7:19 20:3 27:4	<b>appendix</b> [3] 16:2,25 18:18	<b>bad</b> [1] 43:14
<b>20/20</b> [1] 28:17	<b>add</b> [1] 52:22	<b>applicable</b> [3] 5:12 7:6 8:1	<b>bar</b> [3] 16:24 17:6 47:4
<b>2001</b> [1] 61:2	<b>added</b> [2] 9:12 63:9	<b>Application</b> [16] 5:23 8:9,25 16:	<b>barracks</b> [1] 9:21
<b>2004</b> [2] 11:18 24:3	<b>additional</b> [3] 12:20 13:20 16:4	<b>23 18:7 19:18 25:4 38:19,23 39:2</b>	<b>barred</b> [1] 24:9
<b>2008</b> [12] 8:17 13:2 24:16 32:25 35:	<b>address</b> [3] 8:4 20:5 25:23	<b>45:25 46:14 48:22 49:23 56:25 61:</b>	<b>barrier</b> [1] 24:21
<b>19,24 36:1,2 37:5 45:4,7,23</b>	<b>addressed</b> [2] 11:22 58:11	<b>22</b>	<b>based</b> [4] 19:3 25:11 37:25 43:6
<b>2012</b> [1] 36:4	<b>addressing</b> [1] 6:21	<b>applied</b> [7] 12:23 42:13 46:23 49:	<b>baseline</b> [1] 27:8
<b>2020</b> [1] 1:13	<b>adds</b> [2] 51:17 56:14	<b>10 57:14,15 63:14</b>	<b>basic</b> [2] 36:10 54:25
<b>224</b> [1] 4:13	<b>adjust</b> [1] 23:23	<b>applies</b> [16] 5:15 8:22 14:19 15:15,	<b>basically</b> [1] 42:9
<b>24</b> [1] 1:13	<b>advanced</b> [1] 28:11	<b>17 22:19 23:21 25:18 31:16 33:4</b>	<b>basis</b> [3] 9:2 17:6 19:10
<b>26A</b> [1] 18:18	<b>adversary</b> [1] 23:1	<b>34:3 42:3 51:11 56:16 62:1,9</b>	<b>bearing</b> [1] 17:1
<b>272</b> [1] 18:2	<b>advice</b> [1] 60:7	<b>apply</b> [50] 6:5,9,13,15,17 7:10,21 8:	<b>Beaty</b> [1] 11:22
<b>28</b> [1] 3:11	<b>affects</b> [1] 27:13	<b>19,20 9:7 11:11 12:16,18 13:21</b>	<b>behalf</b> [9] 2:3,9 3:4,11,14 4:8 28:3
<b>28(a)</b> [1] 60:19		<b>14:15,21 16:13 18:21 19:4 22:6,</b>	<b>30:1 60:15</b>
<b>3</b>		<b>22 23:6 26:5,6 27:3,5 31:25 32:2</b>	<b>believe</b> [2] 23:11,12
<b>300</b> [1] 11:23		<b>34:5,17,21 35:7 36:18 43:1,24 47:</b>	<b>benefit</b> [1] 18:9
		<b>7,13 48:7 50:11,14 51:3 54:2,4,7</b>	<b>better</b> [1] 48:3
		<b>56:9 57:7 58:16 61:10,13,16</b>	

## Official - Subject to Final Review

<p><b>between</b> <sup>[3]</sup> 21:6 37:12 48:11  <b>big</b> <sup>[1]</sup> 45:21  <b>bill</b> <sup>[5]</sup> 8:14,15 21:11,14,15  <b>Bin</b> <sup>[4]</sup> 4:24 28:13,15 29:4  <b>bit</b> <sup>[1]</sup> 33:3  <b>blue</b> <sup>[1]</sup> 12:1  <b>BMW</b> <sup>[1]</sup> 7:4  <b>board</b> <sup>[1]</sup> 23:6  <b>bodies</b> <sup>[1]</sup> 20:19  <b>bombing</b> <sup>[3]</sup> 9:22 10:2 13:19  <b>bombings</b> <sup>[2]</sup> 4:13 28:11  <b>borders</b> <sup>[1]</sup> 28:24  <b>both</b> <sup>[1]</sup> 62:10  <b>bottom</b> <sup>[1]</sup> 30:10  <b>boy</b> <sup>[2]</sup> 54:15 55:18  <b>Bradley</b> <sup>[3]</sup> 34:10,12 37:18  <b>break</b> <sup>[1]</sup> 21:22  <b>BREYER</b> <sup>[44]</sup> 39:11,14 40:19,22 41:9,12,19,23 42:2,7,16,22,24 44:3,10,16,19,22 45:1,11,15,20 46:5,12,17,21,25 47:9 49:13,17,22 50:5,10,13,16,20 53:24 54:13,20,23 60:18 61:20 62:3,7  <b>brief</b> <sup>[7]</sup> 6:12 8:7 12:1 35:25 36:4 45:5 60:20  <b>briefing</b> <sup>[1]</sup> 57:22  <b>briefs</b> <sup>[1]</sup> 57:10  <b>bring</b> <sup>[1]</sup> 14:6  <b>broad</b> <sup>[1]</sup> 59:25  <b>brought</b> <sup>[19]</sup> 10:15 16:16 17:2 18:19,25 29:9 39:18,23 41:16 44:23,24 45:2,3,5 46:7 50:1,6 61:4,24  <b>Bush's</b> <sup>[1]</sup> 11:25  <b>buy</b> <sup>[1]</sup> 35:2</p>	<p>17:11,12 20:12 23:8 26:8,12 27:17,18 29:16 30:6 31:7,8,9 33:4,5,8 34:3 35:7,10,11 36:10 37:3,8,10,15,23 38:1,3,5,7 42:11 49:7 51:3,7,11,17,20,22,23 52:3,21 56:9,14  <b>causes</b> <sup>[5]</sup> 24:14 33:12 35:3 52:22 53:13  <b>central</b> <sup>[1]</sup> 5:11  <b>centuries</b> <sup>[1]</sup> 55:1  <b>certain</b> <sup>[1]</sup> 31:23  <b>change</b> <sup>[6]</sup> 12:9 32:3,4 35:9 52:18 56:18  <b>changes</b> <sup>[2]</sup> 5:10 52:19  <b>CHIEF</b> <sup>[11]</sup> 4:3,9 17:14,20 19:1 27:24 28:4 60:12,16 63:11,18  <b>chose</b> <sup>[1]</sup> 5:6  <b>CHRISTOPHER</b> <sup>[3]</sup> 2:8 3:10 28:2  <b>Circuit</b> <sup>[5]</sup> 13:23 16:5,25 28:8,12  <b>Circuit's</b> <sup>[3]</sup> 15:18,21 16:11  <b>circumstance</b> <sup>[1]</sup> 26:7  <b>circumstances</b> <sup>[1]</sup> 10:13  <b>cite</b> <sup>[1]</sup> 63:16  <b>citizens</b> <sup>[1]</sup> 29:11  <b>civil</b> <sup>[4]</sup> 37:9 48:1 59:22 60:3  <b>claim</b> <sup>[11]</sup> 6:5,13,16 8:20 10:18 17:7 25:19 32:24 38:23 61:10,16  <b>claimant</b> <sup>[3]</sup> 63:3,8,8  <b>claimants</b> <sup>[1]</sup> 29:15  <b>claims</b> <sup>[24]</sup> 6:10 10:15 16:16,18,19 17:2,4 23:22,23,25 24:4 29:8,9,12,14 30:1,2,11,16 32:17,17 37:25 46:1 61:13  <b>clarify</b> <sup>[2]</sup> 22:13 52:25  <b>class</b> <sup>[1]</sup> 53:8  <b>Clause</b> <sup>[2]</sup> 7:5,8  <b>clear</b> <sup>[32]</sup> 5:19 8:13,16 11:10 18:4 19:21 20:22 21:17 22:6,15 25:25 26:3,9,11 27:4,14,15 28:25 32:1 34:18 35:18 40:13 41:7,10,11,12 43:13 49:11 53:15 54:5,6 57:1  <b>clearly</b> <sup>[6]</sup> 5:17 19:25 27:19 36:16 47:12 55:4  <b>Clinton</b> <sup>[1]</sup> 4:15  <b>close</b> <sup>[1]</sup> 48:10  <b>closely</b> <sup>[2]</sup> 19:13 43:21  <b>collapses</b> <sup>[1]</sup> 15:20  <b>colleague</b> <sup>[1]</sup> 21:25  <b>colleagues</b> <sup>[1]</sup> 34:2  <b>come</b> <sup>[4]</sup> 15:1 55:17 58:25 62:3  <b>comes</b> <sup>[1]</sup> 15:3  <b>command</b> <sup>[1]</sup> 53:21  <b>commenced</b> <sup>[1]</sup> 60:25  <b>comment</b> <sup>[1]</sup> 29:7  <b>comments</b> <sup>[1]</sup> 28:17  <b>committed</b> <sup>[1]</sup> 59:13  <b>common</b> <sup>[3]</sup> 31:1 34:14,25  <b>Communities</b> <sup>[1]</sup> 63:17  <b>compensatory</b> <sup>[14]</sup> 7:18,23 9:10 10:6,19 14:2 20:6 26:19 31:23 32:5 34:4 36:11 37:2,23  <b>complains</b> <sup>[1]</sup> 12:2  <b>complicated</b> <sup>[2]</sup> 30:24 55:19  <b>concede</b> <sup>[6]</sup> 14:19 16:15,22 29:16 31:22 53:6</p>	<p><b>conceded</b> <sup>[2]</sup> 31:15 33:3  <b>concedes</b> <sup>[4]</sup> 6:11 8:21 14:17 61:14  <b>conceding</b> <sup>[1]</sup> 48:18  <b>conceiving</b> <sup>[1]</sup> 55:11  <b>concern</b> <sup>[2]</sup> 19:4,14  <b>concerned</b> <sup>[2]</sup> 31:10 44:13  <b>concerns</b> <sup>[1]</sup> 19:14  <b>concession</b> <sup>[6]</sup> 35:10 36:13 52:15,19,19,20  <b>concluded</b> <sup>[4]</sup> 28:8 34:20,21 60:8  <b>conclusion</b> <sup>[1]</sup> 30:16  <b>condemned</b> <sup>[1]</sup> 60:9  <b>conduct</b> <sup>[7]</sup> 5:6 18:24 43:2,7,13 44:1 47:14  <b>conform</b> <sup>[2]</sup> 5:5 43:7  <b>Congress</b> <sup>[52]</sup> 5:1,17,20,24 6:6,8 7:12 8:17 9:19 10:3 12:3,8 13:2,5,14 14:5,9,15 18:5,13 19:8,15 21:6 22:5 23:22 24:1,17,21 25:24 26:2 27:9,11 32:1,12 34:19 36:16,18,19 38:4 47:11,15 49:12 52:7 55:3,3,20 57:1 58:25 60:7 62:12,18 63:15  <b>Congress's</b> <sup>[4]</sup> 7:1 11:10 12:16 13:17  <b>congressional</b> <sup>[3]</sup> 19:12 25:11,12  <b>consciously</b> <sup>[1]</sup> 27:6  <b>consequences</b> <sup>[1]</sup> 37:19  <b>consider</b> <sup>[1]</sup> 57:11  <b>considered</b> <sup>[2]</sup> 18:6 60:7  <b>considering</b> <sup>[1]</sup> 19:22  <b>considers</b> <sup>[1]</sup> 59:25  <b>consistent</b> <sup>[1]</sup> 63:10  <b>consistently</b> <sup>[3]</sup> 13:7 63:13,14  <b>constitute</b> <sup>[1]</sup> 58:21  <b>constitutional</b> <sup>[7]</sup> 6:25 19:4,13 24:20 25:1,6,15  <b>contesting</b> <sup>[1]</sup> 36:9  <b>context</b> <sup>[5]</sup> 8:10 14:12 19:23 20:21 25:7  <b>contextual</b> <sup>[1]</sup> 26:1  <b>continued</b> <sup>[2]</sup> 4:23 5:4  <b>contractors</b> <sup>[1]</sup> 29:20  <b>contrary</b> <sup>[1]</sup> 63:7  <b>controlling</b> <sup>[1]</sup> 28:24  <b>controls</b> <sup>[2]</sup> 30:21 31:14  <b>conventions</b> <sup>[1]</sup> 59:16  <b>corporations</b> <sup>[1]</sup> 44:4  <b>Corps</b> <sup>[1]</sup> 9:21  <b>correct</b> <sup>[6]</sup> 9:17 21:16 23:3,9 49:21 58:15  <b>correctly</b> <sup>[1]</sup> 57:14  <b>couldn't</b> <sup>[1]</sup> 32:11  <b>counsel</b> <sup>[4]</sup> 17:15 27:25 60:13 63:19  <b>countervailing</b> <sup>[1]</sup> 18:9  <b>countries</b> <sup>[2]</sup> 20:20 44:5  <b>country</b> <sup>[4]</sup> 24:18,20,22 43:17  <b>couple</b> <sup>[1]</sup> 57:13  <b>course</b> <sup>[6]</sup> 13:16,18 17:24 21:8 23:14 30:20  <b>COURT</b> <sup>[25]</sup> 1:1,17 4:10 5:14 6:20 7:16 8:1,8,13 9:20 11:21 15:14 17:</p>	<p>21 18:3 19:21 27:22 28:5 29:6 30:14 34:20,20 48:1 57:11,15 58:10  <b>Court's</b> <sup>[5]</sup> 7:4 34:10 41:5 43:12 44:8  <b>courts</b> <sup>[5]</sup> 11:18 23:24 24:15 46:19 63:14  <b>coverage</b> <sup>[1]</sup> 31:18  <b>covered</b> <sup>[1]</sup> 59:5  <b>create</b> <sup>[1]</sup> 24:10  <b>created</b> <sup>[4]</sup> 10:4,10,12 26:12  <b>creates</b> <sup>[2]</sup> 38:5 54:10  <b>creation</b> <sup>[3]</sup> 9:12 26:7 31:8  <b>criminalize</b> <sup>[1]</sup> 59:21  <b>criminalized</b> <sup>[1]</sup> 60:3  <b>cross-reference</b> <sup>[1]</sup> 48:5  <b>cruise</b> <sup>[1]</sup> 4:15  <b>curiae</b> <sup>[3]</sup> 2:6 3:8 17:18  <b>CURRAN</b> <sup>[89]</sup> 2:8 3:10 28:1,2,4,20 29:25 31:13,19 32:14 33:1,6,9,14,17,20 34:9 35:9,14,15 36:14 37:11,17 38:13,21 39:1 40:14,21 41:5,11,18,22 42:1,3,8,18,23,25 43:12 44:8,15,18,21,25 45:3,13,19,22 46:10,16,24 47:1,10,19 48:15,24 49:5,16,21 50:3,9,12,15,18,22 51:5,10,24 52:2,6,9,17 53:1,9,14,16,20 54:11,17,21,25 55:5,6 56:2,7 58:2,17,20 59:8  <b>current</b> <sup>[1]</sup> 24:2  <b>Cyr</b> <sup>[1]</sup> 47:6</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D.C</b> <sup>[13]</sup> 1:12 2:2,5,8 11:18 13:23 15:18,21 16:5,11,24 28:8,12  <b>dah-dah-dah-dah-dah</b> <sup>[1]</sup> 39:25  <b>damage</b> <sup>[1]</sup> 41:1  <b>damages</b> <sup>[95]</sup> 4:17 5:3,20 7:2,13,19,23,24 8:10,24 9:3,10,11,13 10:6,14,19 11:10,19,24 12:11,16,18,24 13:13,15 14:2,4,9,15,18,21,25 15:11,15,23,25 16:8,12,24 17:7,9 18:14,15 20:6,11,24 22:6 24:9,10 26:19,20 31:18,23 32:5 34:5,6 36:10,11,24 37:2,23 39:24,25 40:4,6,9,17 41:1,4,21 42:13 43:1,11,24 46:23 47:2,11,13,17 48:5,17,20 49:1,18,19 53:7,22 54:2,21 55:9,10 57:5 61:19 62:12  <b>damn</b> <sup>[1]</sup> 55:4  <b>date</b> <sup>[2]</sup> 7:22 48:8  <b>dealing</b> <sup>[3]</sup> 31:7 48:12 50:23  <b>dealt</b> <sup>[1]</sup> 13:5  <b>DECEASED</b> <sup>[1]</sup> 1:6  <b>decedents</b> <sup>[3]</sup> 29:23,25 30:2  <b>decide</b> <sup>[1]</sup> 5:15  <b>decided</b> <sup>[2]</sup> 15:24 30:22  <b>decision</b> <sup>[7]</sup> 7:4 12:7 15:18 16:3 30:25 47:22 57:13  <b>decisions</b> <sup>[2]</sup> 27:4 41:5  <b>default</b> <sup>[1]</sup> 28:9  <b>defaulting</b> <sup>[1]</sup> 58:5  <b>defendant</b> <sup>[6]</sup> 6:24 25:19,20 40:10 49:8 55:12  <b>defendants</b> <sup>[1]</sup> 40:5</p>
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## Official - Subject to Final Review

<p><b>defense</b> [3] 57:25 58:4,7  <b>define</b> [1] 33:12  <b>defined</b> [2] 5:17,21  <b>definitely</b> [2] 10:10,11  <b>demonstrate</b> [2] 11:9 14:14  <b>demonstrates</b> [2] 12:14 13:21  <b>Department</b> [3] 2:5 4:21 60:8  <b>depend</b> [1] 59:10  <b>dependent</b> [1] 18:24  <b>depending</b> [1] 55:24  <b>depends</b> [2] 59:9,19  <b>describe</b> [1] 24:2  <b>described</b> [2] 6:19,20  <b>designated</b> [3] 4:22 25:10 28:15  <b>designation</b> [1] 25:13  <b>determination</b> [1] 25:13  <b>determine</b> [1] 5:17  <b>determined</b> [1] 18:7  <b>devil</b> [1] 28:21  <b>different</b> [10] 10:13 13:14 20:19, 20 23:1 34:19 51:19,20 55:23,24  <b>differently</b> [1] 19:20  <b>dint</b> [1] 10:21  <b>direct</b> [1] 21:23  <b>directed</b> [2] 5:13 6:2  <b>direction</b> [1] 38:16  <b>directive</b> [1] 6:19  <b>directly</b> [4] 15:6 18:25 28:11 35:17  <b>disability</b> [3] 36:25 49:9 52:4  <b>disagree</b> [2] 51:15,21  <b>disagreement</b> [1] 37:4  <b>discussed</b> [2] 21:11 26:2  <b>discussion</b> [1] 43:4  <b>distinct</b> [1] 51:23  <b>distress</b> [3] 10:1 29:12 32:17  <b>doctrine</b> [1] 43:5  <b>doing</b> [1] 18:3  <b>dollar</b> [2] 11:23 12:4  <b>dollars</b> [1] 11:24  <b>done</b> [1] 21:2  <b>down</b> [2] 21:23 55:17  <b>draconian</b> [1] 54:22  <b>drove</b> [1] 16:3  <b>Due</b> [5] 7:5,8 37:3 44:3 48:9</p>	<p>2,13 32:17  <b>emphasized</b> [1] 16:17  <b>employees</b> [1] 29:19  <b>enabling</b> [1] 4:12  <b>enacted</b> [6] 5:1 8:14,17 10:3 12:3 35:24  <b>enacting</b> [2] 9:19 13:12  <b>enactment</b> [11] 7:22 12:22 16:21 36:2 37:6 45:4,7,8,24 50:24 51:8  <b>engaging</b> [1] 59:9  <b>enjoy</b> [1] 56:21  <b>enough</b> [2] 27:16 54:12  <b>entitled</b> [2] 5:23 43:16  <b>entitlement</b> [1] 34:13  <b>enumerated</b> [1] 20:25  <b>environment</b> [1] 29:2  <b>equal-handed</b> [1] 56:19  <b>ERICA</b> [3] 2:4 3:6 17:17  <b>ESQ</b> [4] 3:3,6,10,13  <b>essentially</b> [2] 24:1 30:23  <b>established</b> [1] 30:25  <b>ESTATE</b> [1] 1:5  <b>ET</b> [2] 1:6,9  <b>even</b> [3] 4:24 7:20 43:13  <b>event</b> [1] 31:2  <b>everyone</b> [1] 35:6  <b>everything</b> [1] 21:19  <b>evidence</b> [1] 28:9  <b>exact</b> [1] 37:14  <b>exactly</b> [10] 8:19 18:3,10 23:17 25: 18 38:3,6,13,16 53:19  <b>example</b> [1] 51:19  <b>except</b> [2] 8:23 40:4  <b>exception</b> [8] 13:6 24:7 30:7 58: 15,23 59:3 60:6 61:1  <b>exceptionally</b> [1] 26:3  <b>excepts</b> [1] 59:23  <b>Excuse</b> [1] 52:24  <b>executive</b> [1] 25:13  <b>EXECUTRIX</b> [1] 1:4  <b>exempt</b> [1] 31:17  <b>exist</b> [2] 10:5 46:1  <b>existed</b> [2] 31:3 37:5  <b>expand</b> [3] 13:7,9 30:14  <b>expectation</b> [2] 27:8,9  <b>expectations</b> [1] 36:23  <b>expelled</b> [1] 28:13  <b>explained</b> [1] 18:12  <b>explains</b> [2] 18:3,20  <b>explicit</b> [3] 47:20,22 53:21  <b>explicitly</b> [2] 5:2 47:17  <b>exposure</b> [5] 43:11,25 48:25 49:4, 5  <b>express</b> [4] 47:21,22 52:7 53:21  <b>expressed</b> [1] 11:1  <b>expressly</b> [1] 7:13  <b>expropriating</b> [1] 24:21  <b>extent</b> [2] 23:23 24:12  <b>extra</b> [1] 43:18  <b>extracting</b> [1] 9:3  <b>extrajudicial</b> [3] 57:18 58:14 59: 12  <b>extremely</b> [1] 21:7</p>	<p style="text-align: center;"><b>F</b></p> <p><b>face</b> [1] 40:9  <b>facing</b> [1] 40:5  <b>fact</b> [3] 23:21 35:2 46:17  <b>failed</b> [1] 28:9  <b>fair</b> [2] 7:5 43:24  <b>fairness</b> [4] 4:18,20 27:8 55:1  <b>fall</b> [2] 44:13 62:24  <b>falls</b> [1] 27:19  <b>family</b> [9] 9:22 10:16 15:5,9 29:10 30:3,12 32:18,23  <b>far</b> [1] 44:12  <b>fatwahs</b> [1] 4:25  <b>February</b> [1] 1:13  <b>federal</b> [39] 9:19 10:4 11:5 14:3,18, 20 15:14,16,24 17:11 20:12,21 22: 10 23:8 24:15 27:17 31:1 33:5,10 35:6,10 37:9,13 38:1,5,10,18,23 42:11 49:7 51:3,6,11,17,22 52:3, 21 56:8,13  <b>fees</b> [3] 34:14,16,24  <b>felt</b> [1] 29:12  <b>file</b> [3] 6:7 14:2 61:7  <b>filed</b> [16] 11:17 16:20 36:1,4 39:21 40:23,25 45:6 46:18,25 50:24 53: 3,5 54:1 61:2 62:14  <b>find</b> [2] 12:1 53:23  <b>Fine</b> [1] 40:11  <b>finish</b> [1] 33:18  <b>first</b> [13] 5:16 11:12 16:5 18:13 20: 2 24:11 28:6 31:21 36:15 56:2 61: 22 62:17 63:7  <b>Flatow</b> [8] 5:1 11:20 12:21,25 13:3, 12 46:8,11  <b>focused</b> [1] 25:8  <b>followed</b> [1] 53:12  <b>following</b> [1] 24:15  <b>footing</b> [2] 42:20 56:20  <b>footnote</b> [6] 6:17 7:17 19:20 31:5 47:25 48:11  <b>foreign</b> [28] 5:8,9,13 7:7 19:5,9,18, 23 20:17 22:18,20 24:7 25:1,20 26:8,13,16 29:10 30:3,11 32:4 44: 5 49:7 55:12 56:3 58:6 59:23 60:4  <b>forth</b> [1] 5:24  <b>forward</b> [1] 13:15  <b>foster</b> [1] 29:3  <b>found</b> [2] 49:3 57:15  <b>four</b> [4] 50:22 58:21 59:11 60:4  <b>fourth</b> [1] 36:2  <b>framework</b> [2] 16:10 23:7  <b>free-floating</b> [1] 17:8  <b>fresh-filing</b> [1] 42:21  <b>friend</b> [2] 28:6 48:10  <b>friends</b> [3] 30:15 35:20 46:2  <b>front</b> [1] 44:11  <b>FSIA</b> [4] 19:25 24:2 30:22 31:3  <b>fundamental</b> [2] 4:18 37:20  <b>further</b> [6] 13:21 17:13 27:22 33:3 52:25 57:22  <b>furthermore</b> [1] 32:22</p>	<p><b>gave</b> [1] 12:12  <b>General</b> [2] 2:4 56:13  <b>generally</b> [7] 5:9 12:11 19:8,15 26: 14 27:11 60:2  <b>gets</b> [1] 55:12  <b>getting</b> [1] 53:12  <b>GINSBURG</b> [10] 8:6 14:23 28:19  <b>29:7,23 36:7 43:3 44:7 57:23 58:3</b>  <b>Ginsburg's</b> [1] 20:23  <b>give</b> [2] 41:2,20  <b>given</b> [6] 11:16 34:7 36:8 39:20 58: 8 62:14  <b>gives</b> [1] 62:19  <b>Gore</b> [1] 7:4  <b>GORSUCH</b> [15] 33:1,7,11,15,18, 21 35:1,13 37:7,13 51:15,25 52:5, 8,10  <b>Gorsuch's</b> [1] 37:4  <b>Got</b> [8] 11:3,7 30:8 32:20 47:12,12 54:23 59:20  <b>government</b> [5] 5:8 16:9 26:22,24 27:1  <b>government's</b> [1] 60:20  <b>governments</b> [2] 5:9,13  <b>grant</b> [1] 17:3  <b>guess</b> [5] 9:13 10:9 16:14 44:4 58: 25  <b>guided</b> [1] 5:9  <b>guidepost</b> [1] 21:15  <b>guilty</b> [1] 59:18</p> <p style="text-align: center;"><b>H</b></p> <p><b>Hadix</b> [2] 6:20 8:3  <b>happened</b> [2] 18:11 51:8  <b>happens</b> [2] 49:4 61:7  <b>harbor</b> [1] 5:4  <b>hard</b> [1] 47:15  <b>haven</b> [1] 4:12  <b>hear</b> [1] 4:3  <b>heard</b> [1] 50:4  <b>hearing</b> [1] 28:9  <b>heart</b> [2] 33:22,25  <b>held</b> [1] 9:22  <b>Helmerich</b> [1] 57:13  <b>herself</b> [1] 12:25  <b>hindsight</b> [1] 28:17  <b>history</b> [3] 13:5 14:12 21:16  <b>histrionics</b> [1] 28:7  <b>hit</b> [1] 26:20  <b>Holmes's</b> [1] 43:15  <b>Honor</b> [4] 22:9,21 23:18 24:24  <b>hoping</b> [1] 20:4  <b>hostage</b> [1] 59:16  <b>however</b> [1] 22:4  <b>Hughes</b> [1] 31:11  <b>Hussein</b> [1] 12:5</p> <p style="text-align: center;"><b>I</b></p> <p><b>idea</b> [3] 7:5 26:15 57:17  <b>identical</b> [2] 6:16 30:9  <b>identified</b> [2] 32:15 48:2  <b>identifies</b> [1] 18:16  <b>ignore</b> [1] 13:16  <b>IIED</b> [1] 32:16</p>
Heritage Reporting Corporation			

## Official - Subject to Final Review

<p><b>illegal</b> <sup>[1]</sup> 43:14</p> <p><b>imagine</b> <sup>[1]</sup> 20:16</p> <p><b>immoral</b> <sup>[1]</sup> 43:14</p> <p><b>immunity</b> <sup>[5]</sup> 19:24 23:16,17 24:7 30:8</p> <p><b>imply</b> <sup>[1]</sup> 47:7</p> <p><b>implying</b> <sup>[1]</sup> 37:20</p> <p><b>important</b> <sup>[6]</sup> 8:21 18:2 20:8,15 21:8 35:22</p> <p><b>imports</b> <sup>[1]</sup> 7:5</p> <p><b>impose</b> <sup>[4]</sup> 4:16 19:8 36:24,24</p> <p><b>imposed</b> <sup>[1]</sup> 48:25</p> <p><b>imposing</b> <sup>[1]</sup> 20:1</p> <p><b>imposition</b> <sup>[1]</sup> 54:18</p> <p><b>incarnate</b> <sup>[1]</sup> 28:22</p> <p><b>incident</b> <sup>[2]</sup> 61:3,6</p> <p><b>included</b> <sup>[2]</sup> 11:23 13:18</p> <p><b>includes</b> <sup>[1]</sup> 61:18</p> <p><b>including</b> <sup>[5]</sup> 12:24 31:11,24 57:10,12</p> <p><b>Inclusive</b> <sup>[1]</sup> 63:17</p> <p><b>inconsistent</b> <sup>[3]</sup> 7:16 15:22 16:1</p> <p><b>incorrigible</b> <sup>[1]</sup> 24:18</p> <p><b>increased</b> <sup>[1]</sup> 47:11</p> <p><b>independent</b> <sup>[1]</sup> 62:24</p> <p><b>infliction</b> <sup>[1]</sup> 10:1</p> <p><b>injuries</b> <sup>[2]</sup> 30:3,13</p> <p><b>injury</b> <sup>[2]</sup> 15:6,9</p> <p><b>inquiry</b> <sup>[1]</sup> 21:17</p> <p><b>instance</b> <sup>[5]</sup> 10:6,18 15:7 18:13 24:11</p> <p><b>instead</b> <sup>[4]</sup> 12:12 13:4 28:22 29:2</p> <p><b>intended</b> <sup>[2]</sup> 5:20 28:10</p> <p><b>intent</b> <sup>[3]</sup> 11:10 18:4 19:12</p> <p><b>intention</b> <sup>[1]</sup> 55:2</p> <p><b>intentional</b> <sup>[1]</sup> 9:25</p> <p><b>interests</b> <sup>[1]</sup> 4:25</p> <p><b>international</b> <sup>[5]</sup> 57:20 59:13,18, 23 60:10</p> <p><b>interpretation</b> <sup>[1]</sup> 58:14</p> <p><b>interpreted</b> <sup>[1]</sup> 58:10</p> <p><b>interpretive</b> <sup>[2]</sup> 19:3,7</p> <p><b>invite</b> <sup>[1]</sup> 57:11</p> <p><b>invoked</b> <sup>[1]</sup> 17:9</p> <p><b>involves</b> <sup>[1]</sup> 57:18</p> <p><b>involving</b> <sup>[7]</sup> 5:22 6:23 9:21 12:25 19:5 20:17 22:17</p> <p><b>Iraq</b> <sup>[5]</sup> 11:21,22 12:5,13 62:19</p> <p><b>irrelevant</b> <sup>[3]</sup> 35:12 45:10 46:4</p> <p><b>isn't</b> <sup>[8]</sup> 31:14 40:12 41:9 44:10 50:7,9 54:12 62:1</p> <p><b>issue</b> <sup>[10]</sup> 4:20 14:24 16:11 22:2 25:2 36:5 57:17 58:1,3,3</p> <p><b>issued</b> <sup>[1]</sup> 4:24</p> <p><b>issues</b> <sup>[4]</sup> 19:24 25:15 27:10 29:6</p> <p><b>item</b> <sup>[1]</sup> 14:25</p> <p><b>itself</b> <sup>[5]</sup> 11:15 18:5 23:15 26:9 54:10</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>Judge</b> <sup>[4]</sup> 10:25 13:24 39:19 41:2</p> <p><b>judgment</b> <sup>[5]</sup> 11:15,23 12:4 14:1 62:13</p> <p><b>judgments</b> <sup>[1]</sup> 62:12</p>	<p><b>jurisdiction</b> <sup>[4]</sup> 30:11,18 57:11 62:23</p> <p><b>jurisdictional</b> <sup>[7]</sup> 17:3 30:23 57:16,21 58:1,4,10</p> <p><b>Justice</b> <sup>[135]</sup> 2:5 4:3,9 6:23 7:10 8:6 9:5,18 10:9,20 11:3,7 14:23 15:10 17:14,20,23 19:1 20:3,23 21:18,22,25 22:11,12,25 23:4,10,16, 19 24:17 25:17 26:15,24 27:24 28:4,19 29:7,8,23 31:13 32:7 33:1,7, 11,15,18,21 35:1,13 36:7,25 37:4, 7,13,24 38:15,22 39:10,11,12,14 40:19,22 41:9,12,19,23 42:2,7,16, 22,24 43:3,15 44:3,7,10,16,19,22 45:1,11,15,20 46:5,12,17,21,25 47:9,16 48:15 49:2,13,17,22 50:5,10, 13,16,20 51:1,6,15,25 52:5,8,10, 24 53:2,11,15,19,24 54:13,20,23 55:5,7 56:6 57:23 58:3,13,19 59:4 60:12,17,18 61:20 62:3,7,20 63:11,18</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>KAGAN</b> <sup>[15]</sup> 9:5,18 10:9,20 11:3,7 31:13 32:7 39:10,12 48:15 49:2 55:5,7 56:6</p> <p><b>Kagan's</b> <sup>[1]</sup> 20:4</p> <p><b>Kavanaugh</b> <sup>[1]</sup> 13:25</p> <p><b>Kenya</b> <sup>[1]</sup> 29:11</p> <p><b>key</b> <sup>[1]</sup> 30:19</p> <p><b>Khartoum</b> <sup>[1]</sup> 4:16</p> <p><b>kick</b> <sup>[1]</sup> 39:4</p> <p><b>kicks</b> <sup>[2]</sup> 39:9 57:5</p> <p><b>killing</b> <sup>[4]</sup> 4:13 57:19 58:15 59:12</p> <p><b>kind</b> <sup>[2]</sup> 29:14 48:21</p> <p><b>knowing</b> <sup>[1]</sup> 43:18</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>Laden</b> <sup>[4]</sup> 4:24 28:13,15 29:4</p> <p><b>Lamberth</b> <sup>[1]</sup> 10:25</p> <p><b>Landgraf</b> <sup>[50]</sup> 4:19 5:11,15 6:17, 18 7:11,17,18 8:1,2,13 9:1 16:6 17:25 18:2 19:1,2,22 20:9 21:11, 13 22:5,18,22 23:7 25:4,18,24 27:2 30:20 31:10,14 34:11 36:15,20 37:18 39:2,2 41:6 47:4,5,21,23 48:11 49:12 54:17 56:15,17,22,25</p> <p><b>Landgraf's</b> <sup>[2]</sup> 31:11 51:12</p> <p><b>Landgraf/Altmann</b> <sup>[1]</sup> 22:2</p> <p><b>language</b> <sup>[8]</sup> 6:15,17 7:17 8:18 21:10 22:3 24:1 63:9</p> <p><b>large</b> <sup>[1]</sup> 56:5</p> <p><b>later</b> <sup>[3]</sup> 6:20 8:3 54:1</p> <p><b>latter</b> <sup>[1]</sup> 46:13</p> <p><b>Laughter</b> <sup>[2]</sup> 41:25 46:20</p> <p><b>laundry</b> <sup>[1]</sup> 18:15</p> <p><b>law</b> <sup>[54]</sup> 5:6,10 9:23,24,25 10:15,22, 23 15:12,17,19,23,24 16:8,11,12, 16 17:2,7,9,11,12 20:7,10,19 21:1 23:21,23 24:4,6 29:8,9 30:16 31:1 32:9,10 33:10,16 34:14,25 37:13, 14 38:12,25 43:7,16,22 55:21,22 56:18 57:20 59:13,19 60:10</p> <p><b>least</b> <sup>[4]</sup> 7:4 10:7 11:8 26:6</p>	<p><b>legal</b> <sup>[1]</sup> 63:4</p> <p><b>legislated</b> <sup>[1]</sup> 63:15</p> <p><b>legislates</b> <sup>[1]</sup> 27:12</p> <p><b>legislation</b> <sup>[2]</sup> 5:13 12:3</p> <p><b>lenient</b> <sup>[1]</sup> 27:21</p> <p><b>lens</b> <sup>[2]</sup> 22:5,5</p> <p><b>less</b> <sup>[2]</sup> 8:15 22:15</p> <p><b>lesson</b> <sup>[1]</sup> 26:9</p> <p><b>liabilities</b> <sup>[1]</sup> 27:14</p> <p><b>liability</b> <sup>[8]</sup> 19:9 20:2,14 24:10 43:18 48:20 51:18 55:10</p> <p><b>liable</b> <sup>[3]</sup> 26:18 38:11,24</p> <p><b>lies</b> <sup>[1]</sup> 34:10</p> <p><b>lifted</b> <sup>[1]</sup> 16:7</p> <p><b>limitation</b> <sup>[2]</sup> 57:24,24</p> <p><b>limitations</b> <sup>[2]</sup> 51:19 58:4</p> <p><b>limited</b> <sup>[3]</sup> 10:6 19:13 31:2</p> <p><b>limits</b> <sup>[1]</sup> 7:1</p> <p><b>Lindh</b> <sup>[1]</sup> 47:6</p> <p><b>line</b> <sup>[1]</sup> 30:10</p> <p><b>Lisa</b> <sup>[1]</sup> 12:25</p> <p><b>list</b> <sup>[1]</sup> 18:15</p> <p><b>literally</b> <sup>[1]</sup> 48:13</p> <p><b>litigant</b> <sup>[1]</sup> 25:3</p> <p><b>litigants</b> <sup>[1]</sup> 56:20</p> <p><b>litigation</b> <sup>[1]</sup> 56:4</p> <p><b>little</b> <sup>[4]</sup> 22:15 33:2 43:20 46:6</p> <p><b>lived</b> <sup>[1]</sup> 10:17</p> <p><b>long</b> <sup>[1]</sup> 29:3</p> <p><b>longer</b> <sup>[1]</sup> 52:16</p> <p><b>look</b> <sup>[20]</sup> 13:4 16:10 21:16 22:4 36:21 37:18 39:15,22 45:23 49:15,17, 22,23 50:13 53:25 56:10 57:2 61:21,21,22</p> <p><b>looked</b> <sup>[3]</sup> 7:16 13:13,15</p> <p><b>looking</b> <sup>[3]</sup> 21:13 41:1 45:13</p> <p><b>lose</b> <sup>[3]</sup> 4:21 51:16,23</p> <p><b>lost</b> <sup>[1]</sup> 53:12</p> <p><b>lot</b> <sup>[1]</sup> 31:19</p> <p><b>Louisiana</b> <sup>[4]</sup> 9:23 10:24 32:15,21</p> <p><b>lower</b> <sup>[1]</sup> 63:14</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>made</b> <sup>[3]</sup> 6:4,9 61:9</p> <p><b>magic</b> <sup>[3]</sup> 7:14,25 17:23</p> <p><b>maintaining</b> <sup>[1]</sup> 43:9</p> <p><b>man</b> <sup>[3]</sup> 41:13,15 43:14</p> <p><b>manner</b> <sup>[1]</sup> 19:16</p> <p><b>many</b> <sup>[3]</sup> 11:18 20:18,19</p> <p><b>Marine</b> <sup>[1]</sup> 9:21</p> <p><b>Martin</b> <sup>[2]</sup> 6:20 8:3</p> <p><b>material</b> <sup>[2]</sup> 4:12 51:18</p> <p><b>matter</b> <sup>[9]</sup> 1:16 30:11,17 32:9 33:10,22 34:1 57:10 62:22</p> <p><b>MATTHEW</b> <sup>[5]</sup> 2:2 3:3,13 4:7 60:14</p> <p><b>McGILL</b> <sup>[36]</sup> 2:2 3:3,13 4:6,7,9 7:3, 15 8:11 9:5,17 10:16,21 11:4,8 15:2,13 18:12 20:5 21:7,9 32:7,14 48:10 49:2 58:13,25 60:13,14,16 62:2,5,9,20 63:2,13</p> <p><b>McGill's</b> <sup>[3]</sup> 28:7,16 32:13</p> <p><b>mean</b> <sup>[12]</sup> 9:7 10:10 23:13 26:15 31:15 37:9,15 39:12,15 42:17 53:</p>	<p>25 54:14</p> <p><b>meaning</b> <sup>[2]</sup> 7:8 63:8</p> <p><b>means</b> <sup>[3]</sup> 47:20,21 63:4</p> <p><b>meant</b> <sup>[1]</sup> 6:12</p> <p><b>member</b> <sup>[3]</sup> 10:16 15:5,9</p> <p><b>members</b> <sup>[6]</sup> 9:22 29:10 30:3,12 32:18,24</p> <p><b>men</b> <sup>[1]</sup> 41:14</p> <p><b>mention</b> <sup>[1]</sup> 47:2</p> <p><b>mentioned</b> <sup>[1]</sup> 21:7</p> <p><b>mere</b> <sup>[1]</sup> 35:2</p> <p><b>merits</b> <sup>[1]</sup> 58:12</p> <p><b>met</b> <sup>[1]</sup> 31:14</p> <p><b>might</b> <sup>[3]</sup> 26:17 35:9 43:9</p> <p><b>million</b> <sup>[4]</sup> 11:23,24 12:4 43:20</p> <p><b>mind</b> <sup>[3]</sup> 13:18 32:12 55:20</p> <p><b>minutes</b> <sup>[1]</sup> 60:13</p> <p><b>misdeeds</b> <sup>[1]</sup> 12:5</p> <p><b>missiles</b> <sup>[1]</sup> 4:16</p> <p><b>missing</b> <sup>[2]</sup> 52:14,14</p> <p><b>mix</b> <sup>[1]</sup> 48:22</p> <p><b>modification</b> <sup>[1]</sup> 31:9</p> <p><b>Monday</b> <sup>[1]</sup> 1:13</p> <p><b>money</b> <sup>[1]</sup> 14:18</p> <p><b>MONICAH</b> <sup>[1]</sup> 1:3</p> <p><b>morning</b> <sup>[2]</sup> 17:22 26:2</p> <p><b>mortal</b> <sup>[3]</sup> 41:14,15,24</p> <p><b>most</b> <sup>[2]</sup> 13:17 28:23</p> <p><b>motion</b> <sup>[2]</sup> 39:18 42:4</p> <p><b>move</b> <sup>[1]</sup> 35:3</p> <p><b>Ms</b> <sup>[17]</sup> 17:16,20 19:11 21:18,21,24 22:9,21 23:3,5,13,17,20 24:24 25:22 26:23 32:13</p> <p><b>much</b> <sup>[3]</sup> 19:14 35:4 52:22</p> <p><b>myself</b> <sup>[1]</sup> 42:17</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>narrow</b> <sup>[3]</sup> 13:2 25:8 26:7</p> <p><b>nation</b> <sup>[1]</sup> 6:25</p> <p><b>national</b> <sup>[2]</sup> 29:10 30:12</p> <p><b>nationals</b> <sup>[1]</sup> 29:19</p> <p><b>necessarily</b> <sup>[5]</sup> 18:24 20:9,25 21:3 37:9</p> <p><b>need</b> <sup>[2]</sup> 5:14 25:23</p> <p><b>negligent</b> <sup>[1]</sup> 28:23</p> <p><b>neither</b> <sup>[1]</sup> 24:9</p> <p><b>never</b> <sup>[1]</sup> 8:8</p> <p><b>new</b> <sup>[4]</sup> 6:8 9:11 11:14 14:2,3 20:2 26:7,11 33:8,9 34:3,17 36:21,24 37:21 39:4 40:6 42:11 47:13 48:18,21,24 49:7,9,9,9 51:1,6,11,18 52:3,4,6 53:13 55:10,10,13,15 56:14,23 57:6</p> <p><b>newer</b> <sup>[1]</sup> 54:9</p> <p><b>next</b> <sup>[2]</sup> 4:4 36:20</p> <p><b>nexus</b> <sup>[3]</sup> 29:18 30:9 63:1</p> <p><b>non-present</b> <sup>[1]</sup> 32:18</p> <p><b>None</b> <sup>[6]</sup> 35:22 36:5 44:18,21 45:7 50:24</p> <p><b>note</b> <sup>[4]</sup> 8:21 20:8 21:12 28:7</p> <p><b>noted</b> <sup>[1]</sup> 21:9</p> <p><b>nothing</b> <sup>[10]</sup> 38:7 42:12,14,25 45:23 47:16 48:13,14 49:25 56:14</p> <p><b>notice</b> <sup>[3]</sup> 7:6 43:16,25</p>
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## Official - Subject to Final Review

<p><b>notion</b> [2] 26:5 54:18  <b>notorious</b> [1] 29:4</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>obtain</b> [1] 24:13  <b>Obviously</b> [3] 21:13 24:5 26:12  <b>officially</b> [1] 59:7  <b>often</b> [1] 37:7  <b>Okay</b> [9] 23:2 31:19 32:18 33:7,14  34:12 40:24 53:14 58:22  <b>OKOBA</b> [1] 1:3  <b>old</b> [2] 9:8 60:25  <b>older</b> [1] 54:8  <b>once</b> [3] 14:9 16:15,21  <b>One</b> [18] 11:20 13:20 21:2,8 27:2  29:7 34:3 40:6 45:6 52:25 54:6,24  57:12,24 59:25 60:1,23 62:21  <b>ones</b> [1] 59:15  <b>only</b> [16] 8:2 9:11 11:13 13:15 14:5  16:18 22:18 23:11 36:9 40:6 42:3  43:24 46:14 48:17 59:6,13  <b>OPATI</b> [4] 1:3,5 4:4 36:2  <b>open</b> [1] 23:24  <b>opening</b> [1] 28:7  <b>operate</b> [1] 39:5  <b>operation</b> [6] 13:22 36:22 51:14  56:15 57:3,4  <b>opinion</b> [1] 13:24  <b>opportunity</b> [2] 5:5 43:6  <b>opposite</b> [1] 38:16  <b>oral</b> [7] 1:17 3:2,5,9 4:7 17:17 28:2  <b>originally</b> [6] 11:17 15:3 16:21 39:  21 40:23,24  <b>Osama</b> [1] 4:24  <b>other</b> [20] 9:10 11:9 15:8 17:6 20:  10 25:3 31:15,23,23 46:6 48:19,  20,25 56:20,21,21 57:9,21 59:15  61:2  <b>others</b> [1] 59:8  <b>otherwise</b> [2] 10:5 24:13  <b>out</b> [9] 4:13 14:7 20:1,6 23:14 26:  11 61:3,6 62:7  <b>outcomes</b> [1] 16:2  <b>outer</b> [1] 54:15  <b>outlier</b> [1] 32:19  <b>over</b> [1] 47:23  <b>Owens</b> [3] 61:1,5,7  <b>OWN</b> [3] 1:3 16:11 30:13</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> [1] 63:20  <b>PAGE</b> [11] 3:2 6:11 16:2 18:2,18  19:20 35:25 36:3 45:5 61:3,13  <b>pain</b> [3] 14:20 36:11 41:3  <b>parallel</b> [2] 30:8 38:6  <b>Pardon</b> [1] 44:15  <b>part</b> [8] 9:18,18 11:5 19:24 31:16  40:5 54:2 62:4  <b>particular</b> [3] 24:18 25:6 32:10  <b>particularly</b> [5] 5:7 19:22 20:16  25:7 43:23  <b>party</b> [3] 25:21 42:5 43:25  <b>passage</b> [1] 34:23  <b>passed</b> [2] 34:15 48:2</p>	<p><b>passes</b> [1] 38:4  <b>past</b> [4] 5:22 6:2 12:24 14:16  <b>pay</b> [1] 18:8  <b>payroll</b> [1] 59:7  <b>Pending</b> [20] 5:24 7:22 35:21,23  36:6 42:4,5,6 44:12,14,17,19 45:7  46:2,14,19 49:23 50:25 53:17 61:  23  <b>Pennsylvania</b> [9] 9:23 10:17,18,  21,23 32:16,21 55:21 56:10  <b>people</b> [5] 4:14 28:24 43:6 55:23  56:10  <b>perfectly</b> [1] 13:8  <b>permanently</b> [1] 28:13  <b>permissible</b> [1] 52:12  <b>permit</b> [2] 9:25 25:12  <b>permitted</b> [1] 8:8  <b>person</b> [5] 9:9 10:24 14:1,8 42:23  <b>persons</b> [5] 7:6,7 9:22 10:1 44:5  <b>persuasively</b> [1] 14:14  <b>Peterson</b> [2] 9:20 11:1  <b>petition</b> [2] 16:2,25  <b>Petitioner's</b> [1] 16:18  <b>Petitioners</b> [12] 1:7 2:3,7 3:4,8,14  4:8 17:19,24,25 23:5 60:15  <b>place</b> [1] 45:14  <b>placement</b> [1] 58:9  <b>plain</b> [2] 22:3 63:7  <b>plaintiff</b> [2] 42:5,20  <b>plaintiffs</b> [6] 23:25 24:5,13 29:13  32:20 40:10  <b>please</b> [5] 4:10 17:21 28:5 33:19  53:1  <b>point</b> [11] 10:8 12:20 13:20 16:14  30:20,21 31:22 33:17 35:20,22 37:  4  <b>points</b> [3] 11:9 16:4 20:6  <b>polycymaking</b> [1] 5:10  <b>position</b> [7] 24:25 30:20 32:23 43:  17 48:16 56:8 58:8  <b>potential</b> [2] 18:6 51:18  <b>practical</b> [3] 37:19 51:13 56:12  <b>pre-2008</b> [1] 31:4  <b>pre-enactment</b> [3] 18:24 43:2 47:  14  <b>preceding</b> [1] 54:6  <b>predicate</b> [5] 58:21 59:10,11,19  60:5  <b>preemption</b> [1] 17:8  <b>preexisting</b> [3] 23:25 38:6 52:22  <b>prejudice</b> [2] 39:7 52:6  <b>premise</b> [1] 51:16  <b>premised</b> [1] 52:20  <b>premises</b> [1] 52:18  <b>present</b> [1] 10:2  <b>presented</b> [1] 30:15  <b>presents</b> [1] 56:24  <b>President</b> [6] 4:15 11:25 12:12,14  21:6 62:17  <b>President's</b> [1] 62:18  <b>presume</b> [2] 38:18 43:23  <b>presumption</b> [10] 4:19 5:12 9:1  16:6 22:17,19 25:4 39:3,8 57:5  <b>presumptions</b> [1] 56:21</p>	<p><b>pretty</b> [5] 26:9 43:13 47:12 54:13  55:4  <b>prevail</b> [1] 52:1  <b>prevent</b> [1] 43:11  <b>previously</b> [2] 21:2 24:9  <b>previously-filed</b> [1] 18:23  <b>price</b> [1] 18:8  <b>primary</b> [2] 5:6 15:21  <b>principles</b> [3] 4:18 54:25 56:3  <b>prior</b> [15] 5:25 6:6,6 11:12,18 18:  22 20:7 21:11,14,14 35:11 42:10  62:5,10,10  <b>private</b> [5] 6:24,24 22:19 23:11 25:  21  <b>probably</b> [2] 55:19 57:21  <b>problem</b> [1] 38:22  <b>proceeding</b> [2] 9:23 24:5  <b>proceedings</b> [3] 6:18 7:21 8:20  <b>Process</b> [4] 7:5,8 21:19 44:4  <b>progeny</b> [2] 31:11 41:6  <b>prohibited</b> [1] 60:2  <b>Project</b> [1] 63:17  <b>proper</b> [1] 39:1  <b>proposed</b> [1] 59:1  <b>proposition</b> [1] 22:8  <b>prospectively</b> [2] 19:16 27:12  <b>provide</b> [10] 13:14 14:8,10 15:25  20:13 32:16 37:14 49:18 59:22 60:  3  <b>provided</b> [7] 4:11 5:2 7:23 11:13  12:15 20:10 27:20  <b>provides</b> [5] 18:21 21:15 33:16 42:  4 61:15  <b>providing</b> [2] 13:12 29:2  <b>provision</b> [13] 11:12 13:23,25 24:  8 25:8 36:22 37:21 48:6,6,11 51:9  57:6 60:20  <b>provisions</b> [2] 35:21 46:3  <b>punish</b> [1] 24:19  <b>punishment</b> [2] 47:8 49:10  <b>punitive</b> [70] 4:16 5:2,20 7:1,12,19,  23 8:10,23 9:3,13 10:14 11:10,19,  24 12:11,15,18,23 13:13,14 14:3,9,  15 15:11,15,23,25 16:8,12,24 17:6,  9 18:14 22:6 24:9,10 26:20 31:18  34:6 36:9 39:25 40:4,6,9,15,17 41:  4,20 42:13 43:1,11,24 46:23 47:2,  13,17 48:17,25 49:18,19 53:7,22  54:1,21 55:9,9 57:4 61:19 62:11  <b>punitives</b> [1] 9:14  <b>pursue</b> [1] 33:2  <b>putting</b> [3] 10:14 42:19,19</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>Qaeda</b> [4] 4:11 5:4 28:15 43:10  <b>qualifying</b> [1] 11:13  <b>question</b> [14] 17:23 20:4,23 21:4  23:15 30:15 31:20 33:2 34:16 35:  17 57:25 58:20,24,24  <b>questions</b> [3] 17:13 23:12 27:22  <b>quite</b> [1] 27:15</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>radical</b> [2] 56:23 57:8</p>	<p><b>raise</b> [1] 57:20  <b>raised</b> [2] 25:2 29:8  <b>rather</b> [1] 6:24  <b>ratified</b> [1] 63:16  <b>rationale</b> [5] 5:11 9:19 11:5 15:21  16:12  <b>reach</b> [4] 5:18 6:21 8:5 24:22  <b>reaching</b> [1] 62:22  <b>reaction</b> [1] 12:17  <b>read</b> [4] 20:9,11 39:16 41:2  <b>reading</b> [1] 61:14  <b>reality</b> [1] 52:21  <b>really</b> [11] 9:6 15:19 16:3 25:15 27:  13 34:22 36:8 45:17 52:3,4 55:10  <b>reason</b> [5] 9:14 13:1,11 14:5 62:  16  <b>reasons</b> [5] 18:11 21:8 26:1 27:20  63:6  <b>REBUTTAL</b> [2] 3:12 60:14  <b>recognized</b> [3] 8:2 13:24 16:5  <b>record</b> [2] 28:22 35:6  <b>recover</b> [1] 10:24  <b>redress</b> [1] 30:12  <b>refer</b> [1] 54:7  <b>reference</b> [5] 7:20 12:6 40:15,17,  18  <b>referred</b> [1] 36:3  <b>referring</b> [1] 47:17  <b>refers</b> [1] 15:4  <b>regimes</b> [1] 34:19  <b>regret</b> [1] 11:1  <b>rejected</b> [1] 58:25  <b>related</b> [12] 5:25 6:7 12:21 13:22,  25 18:22 19:24 60:21,23 61:5 62:  4,6  <b>relatives</b> [1] 62:23  <b>relevant</b> [2] 44:1 53:16  <b>relief</b> [3] 13:2,9 31:24  <b>remand</b> [1] 57:22  <b>remedies</b> [2] 59:22 60:3  <b>remedy</b> [6] 9:24 10:5 13:15 15:15  24:14 37:14  <b>reneging</b> [1] 36:13  <b>repeat</b> [1] 42:17  <b>representative</b> [2] 29:13 63:4  <b>representatives</b> [1] 29:21  <b>REPUBLIC</b> [3] 1:9 4:5,5  <b>require</b> [3] 18:1 57:22 62:25  <b>requirement</b> [3] 7:14,25 17:24  <b>requirements</b> [1] 30:9  <b>requires</b> [2] 25:24 52:7  <b>requiring</b> [1] 18:4  <b>residents</b> [2] 43:19,20  <b>resolve</b> [1] 27:16  <b>resorting</b> [1] 46:2  <b>respect</b> [16] 12:9,13 15:18 22:10  23:22 24:3 31:21 37:2,2,3 39:17  44:22 48:9 50:6 61:23 62:19  <b>Respondents</b> [4] 1:10 2:9 3:11  28:3  <b>responding</b> [1] 28:20  <b>response</b> [3] 12:8 28:6 62:18  <b>responsive</b> [1] 35:17  <b>rest</b> [3] 9:3,6,15</p>
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## Official - Subject to Final Review

<p>restored <sup>[1]</sup> 11:14  restriction <sup>[1]</sup> 16:7  retaliation <sup>[1]</sup> 4:15  retro <sup>[1]</sup> 51:13  retroactive <sup>[26]</sup> 7:2,13 8:8 9:16 18:7 31:18 34:23 35:19 36:17,22 38:10,17,19,23 39:5 40:7 48:4,13,22 49:20 51:14 53:7 54:18 56:15 57:3,4  retroactively <sup>[30]</sup> 8:23 9:7 11:11 12:16,19 13:22 14:19,22 15:16 19:9 22:6 31:16,25 32:2 33:5 34:4,5,7,18,22 35:7 37:21 39:6 47:11,14 49:11 51:4,12 56:16 57:7  retroactivity <sup>[23]</sup> 12:10,11 15:11 23:10 18 41:8 42:14 43:5 47:3 50:17 52:9,12 53:22 54:3,8 56:9 61:25  reverse <sup>[1]</sup> 27:23  revive <sup>[1]</sup> 12:4  revived <sup>[1]</sup> 62:13  rights <sup>[5]</sup> 22:19 23:11 25:1 37:10 48:2  ROBERTS <sup>[7]</sup> 4:3 17:14 19:1 27:24 60:12 63:11,18  roped <sup>[1]</sup> 7:18  ROSS <sup>[19]</sup> 2:4 3:6 17:16,17,20 19:11 21:18,21,24 22:9,21 23:3,5,13,17,20 24:24 25:22 26:23  Ross's <sup>[1]</sup> 32:13  rules <sup>[1]</sup> 48:20  rush <sup>[1]</sup> 33:24</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p>sabotage <sup>[1]</sup> 59:15  Saddam <sup>[1]</sup> 12:5  safe <sup>[1]</sup> 4:11  same <sup>[15]</sup> 8:19 10:24 14:7 20:11 25:18 26:5 34:8 37:14,15 38:3 42:20 56:20 61:3,6 62:8  satisfied <sup>[1]</sup> 22:23  satisfies <sup>[1]</sup> 27:21  saying <sup>[19]</sup> 6:8 7:12 22:16 38:14 43:13 46:13 48:16,18 49:14,24 51:2,10 52:13 53:13 54:11,12 61:20,21,23  says <sup>[19]</sup> 8:18 16:25 18:13 38:7 39:17 40:22 41:13,16 42:12,14,15,16,25 44:22 50:5 55:6 56:17 58:13 62:1  scene <sup>[1]</sup> 10:2  scheme <sup>[2]</sup> 9:8 60:1  scope <sup>[1]</sup> 24:25  scrutiny <sup>[1]</sup> 30:17  second <sup>[3]</sup> 14:6 51:12 63:8  secondary <sup>[1]</sup> 32:22  Section <sup>[33]</sup> 6:4,5,6,9,13,14 7:21,22 8:16,16,22 9:4 11:15 16:17,19,23 17:3,5 18:17,20,25 24:6,8 45:9,17 50:7,10,14 61:9,10,15,16,17  see <sup>[10]</sup> 22:2 32:10 36:21 45:11,15,24 50:16 54:23 57:2 60:20  seek <sup>[1]</sup> 14:3</p>	<p>seeking <sup>[1]</sup> 30:12  seem <sup>[1]</sup> 36:12  seems <sup>[2]</sup> 55:18,19  seen <sup>[1]</sup> 14:24  sees <sup>[1]</sup> 60:1  selective <sup>[1]</sup> 28:17  self-consciously <sup>[1]</sup> 19:25  semantics <sup>[1]</sup> 58:18  sense <sup>[4]</sup> 9:8 34:6 54:7 56:1  sent <sup>[1]</sup> 4:15  separate <sup>[2]</sup> 9:15 51:22  series <sup>[1]</sup> 57:20  set <sup>[2]</sup> 5:24 20:11  SETLA <sup>[1]</sup> 1:5  sets <sup>[1]</sup> 47:4  settled <sup>[1]</sup> 36:23  several <sup>[2]</sup> 25:11 63:5  shall <sup>[15]</sup> 6:5,9,15,17 7:21 8:19,20 11:16 39:19,20 41:1,17 48:6 61:10 62:13  shelter <sup>[1]</sup> 4:24  short <sup>[1]</sup> 47:16  shouldn't <sup>[3]</sup> 27:7 49:10 56:9  show <sup>[2]</sup> 28:9 48:4  shows <sup>[1]</sup> 28:23  significant <sup>[1]</sup> 47:10  similar <sup>[2]</sup> 21:10,10  simply <sup>[9]</sup> 5:12 8:6 19:14,18 22:22 24:12,21 27:9 61:15  since <sup>[1]</sup> 12:22  single <sup>[1]</sup> 8:22  situation <sup>[1]</sup> 26:11  situations <sup>[3]</sup> 20:1 27:3,5  small <sup>[2]</sup> 46:15 61:24  Socrates <sup>[4]</sup> 41:13,15,15,23  solatium <sup>[7]</sup> 14:20,25 20:25 31:24 32:6 36:12 41:3  solely <sup>[1]</sup> 12:13  Solicitor <sup>[1]</sup> 2:4  somebody <sup>[2]</sup> 14:6 55:20  somehow <sup>[1]</sup> 4:17  someone <sup>[1]</sup> 27:6  sometimes <sup>[1]</sup> 32:8  Sorry <sup>[4]</sup> 21:21 22:25 33:20 61:8  sort <sup>[6]</sup> 19:2 21:2,12,15 26:9 27:6  sorts <sup>[1]</sup> 48:19  SOTOMAYOR <sup>[15]</sup> 21:18,22,25 22:11,25 23:4,10,16,19 52:24 53:2,11,15,19 62:20  sounds <sup>[1]</sup> 34:1  source <sup>[2]</sup> 20:10 33:15  sovereign <sup>[8]</sup> 6:25 19:5,23 20:17 24:7 25:9 49:8 58:6  sovereigns <sup>[5]</sup> 19:18 22:18,20 26:13 56:4  space <sup>[2]</sup> 37:12 54:15  specific <sup>[1]</sup> 57:19  specifically <sup>[7]</sup> 7:20 12:12 18:16 20:24 28:10 31:6 48:5  specify <sup>[1]</sup> 36:16  sponsor <sup>[3]</sup> 4:22 24:19 26:17  sponsors <sup>[1]</sup> 25:9  sponsorship <sup>[1]</sup> 25:14  spouse <sup>[2]</sup> 15:7,8</p>	<p>St <sup>[1]</sup> 47:6  stage <sup>[3]</sup> 35:14 52:16,18  standard <sup>[1]</sup> 57:16  start <sup>[2]</sup> 17:22 60:18  State <sup>[66]</sup> 4:21,22 9:24,25 10:14,22,23 15:11,17,19,19,22 16:7,10,12,16 17:2,7,8,11 19:9 20:20 21:1 23:21,23 24:2,4,6,14,15 25:9,9,20 26:8,16 27:18 29:7,9 30:16 32:9,9,10,10 35:3,11,11 37:8,14,25 38:2,6,12,18,24 51:23 52:22 55:7,11,12,24 59:7,14,17 60:4,8 62:24  state's <sup>[1]</sup> 25:1  state-sponsored <sup>[1]</sup> 5:3  statement <sup>[9]</sup> 12:1 21:17 32:1 34:18 35:18 41:7 49:11 52:7 57:1  statements <sup>[1]</sup> 56:22  STATES <sup>[18]</sup> 1:1,18 2:6 3:7 7:7,9 17:18 18:4 23:24 24:23,25 32:4,15,19 48:19 49:3,6 59:24  statute <sup>[23]</sup> 6:22 8:5 12:15 14:11,12 16:21 18:12 22:3 30:23 31:16 34:8,15,17,21,24 35:24 38:4,11 39:4,8 40:8 50:24 57:24  statute's <sup>[1]</sup> 5:18  statutes <sup>[3]</sup> 25:12 51:19 62:25  statutory <sup>[3]</sup> 8:9 9:8 60:1  step <sup>[5]</sup> 5:16 36:20 51:13 52:25 54:22  steps <sup>[1]</sup> 56:25  Stevens <sup>[1]</sup> 47:25  still <sup>[10]</sup> 5:4 24:3 35:5 40:12 43:16 46:18 47:1,2 53:20 58:22  stop <sup>[1]</sup> 26:21  Story's <sup>[1]</sup> 36:25  straightforward <sup>[1]</sup> 56:24  strange <sup>[1]</sup> 43:4  strictly <sup>[1]</sup> 30:23  strong <sup>[1]</sup> 52:21  stronger <sup>[1]</sup> 53:24  stuff <sup>[1]</sup> 35:19  subject <sup>[6]</sup> 30:10,17 32:5 39:8 57:10 62:22  submit <sup>[1]</sup> 36:6  submitted <sup>[2]</sup> 63:19,21  subsection <sup>[1]</sup> 5:23  subsequent <sup>[1]</sup> 27:4  substantial <sup>[1]</sup> 32:4  substantive <sup>[5]</sup> 19:2,6,15 27:14 31:1  SUDAN <sup>[26]</sup> 1:9 4:5,11,17,21,22,23 5:4,5,8 6:11 8:6,12,21 14:17 25:2,2 28:10,13,21,23 29:1 43:9,18 56:20 61:13  sue <sup>[1]</sup> 51:7  suffering <sup>[5]</sup> 14:21 15:4,9 36:11 41:3  suffers <sup>[1]</sup> 15:7  sufficient <sup>[5]</sup> 8:4,15 29:18 47:18 48:3  suggest <sup>[1]</sup> 30:15  suggested <sup>[1]</sup> 25:5  suggestion <sup>[1]</sup> 45:25  summarized <sup>[1]</sup> 40:16</p>	<p>supervised <sup>[1]</sup> 43:19  support <sup>[1]</sup> 4:12  supporting <sup>[3]</sup> 2:7 3:8 17:19  Suppose <sup>[4]</sup> 38:1 39:11,14 49:2  supposed <sup>[1]</sup> 43:5  SUPREME <sup>[2]</sup> 1:1,17  surely <sup>[1]</sup> 4:21  surprising <sup>[1]</sup> 5:7  swept <sup>[1]</sup> 48:21</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p>tact <sup>[1]</sup> 23:1  Tanzania <sup>[1]</sup> 29:11  technical <sup>[1]</sup> 63:9  tells <sup>[2]</sup> 8:7 54:17  temporal <sup>[4]</sup> 5:18 6:21 8:4 45:25  term <sup>[2]</sup> 14:24 57:19  terminology <sup>[2]</sup> 36:25 43:15  terrorism <sup>[26]</sup> 4:23 5:3,22 6:2 12:24 13:6,10,17 14:7,16 24:19 25:10,14 26:17 29:3 58:15,16,22,23 59:1,2,23 60:1,2,6,25  terrorist <sup>[2]</sup> 29:2,4  terrorists <sup>[2]</sup> 28:15 59:4  test <sup>[2]</sup> 7:11 27:21  text <sup>[3]</sup> 14:11 31:5 58:9  textual <sup>[3]</sup> 9:2 17:6 25:25  themselves <sup>[2]</sup> 15:5 30:4  There's <sup>[25]</sup> 8:25,25 9:2 13:11 30:10 31:19 32:1 34:22 35:18 36:17 37:8,9,11,22 38:14,14 40:14,16,17 43:3 45:22 48:10 49:3 55:13 57:2  therefore <sup>[5]</sup> 17:1 42:9 56:15 58:5 61:12  thinking <sup>[5]</sup> 26:13,22,24,25 27:6  thinks <sup>[1]</sup> 27:10  third <sup>[2]</sup> 16:14 63:12  though <sup>[2]</sup> 35:5 52:11  thousands <sup>[1]</sup> 4:14  three <sup>[4]</sup> 36:1 49:3 54:1 60:13  throughout <sup>[1]</sup> 45:23  tied <sup>[1]</sup> 19:13  timely <sup>[2]</sup> 53:5 60:25  today <sup>[2]</sup> 24:4 35:23  together <sup>[3]</sup> 7:18 14:13,14  tort <sup>[3]</sup> 10:23 37:8 62:24  torture <sup>[1]</sup> 59:12  transition <sup>[3]</sup> 42:9,12 46:3  transitioned <sup>[1]</sup> 42:19  treat <sup>[1]</sup> 41:20  treated <sup>[3]</sup> 39:19 41:17 55:23  treatment <sup>[1]</sup> 56:19  true <sup>[6]</sup> 20:5 24:3 37:11 46:19 55:14,16  try <sup>[1]</sup> 33:2  trying <sup>[1]</sup> 21:19  turn <sup>[3]</sup> 29:5 60:19 61:2  turning <sup>[1]</sup> 30:19  two <sup>[13]</sup> 5:21,24 8:23 11:8,9 16:4 21:8 28:14 32:15,19 35:24 40:8 59:11  twofold <sup>[1]</sup> 27:1  type <sup>[2]</sup> 20:13 21:16  types <sup>[3]</sup> 20:19,24 58:22</p>
--	---	---	--

## Official - Subject to Final Review

<b>U</b>	
<b>U.S.</b> <sup>[13]</sup> 4:25 5:6,10 26:22,24 27:1 28:14 29:18,18,19,20 30:9 63:1	<b>whatever</b> <sup>[4]</sup> 22:4 39:16,16 51:21
<b>ultimately</b> <sup>[1]</sup> 5:14	<b>whatsoever</b> <sup>[1]</sup> 38:7
<b>Um-hum</b> <sup>[1]</sup> 47:9	<b>Whereupon</b> <sup>[1]</sup> 63:20
<b>unambiguous</b> <sup>[1]</sup> 6:19	<b>whether</b> <sup>[13]</sup> 5:15,17 20:9,12,23 36:16,21 43:1 49:19 57:2 58:3,6 62:23
<b>unambiguously</b> <sup>[2]</sup> 6:21 8:4	<b>whisper</b> <sup>[1]</sup> 45:24
<b>under</b> <sup>[85]</sup> 6:5,7,13 7:3 9:8,23 10:19 11:14,17,19 12:21 13:3 14:2 15:11,16 16:11,16,19,22 17:2 18:13,19,25 20:7 21:1 24:5,14 27:19 29:17 30:5,6,7,17 34:14,25 35:16 37:17,18 38:12,17,18,24 39:2,18,21,23 40:23,25 41:16,20 43:15 44:23,24 45:2,5 46:1,7,13 49:6,12 50:1,6 51:6,12 53:17 55:21,22 56:15 57:20 59:5,5,12,16,18 60:4,25 61:4,7,8,8,10,16,17,24 62:14	<b>will</b> <sup>[7]</sup> 18:14,19,21 45:24 53:9 55:16 60:20
<b>underpinning</b> <sup>[1]</sup> 5:11	<b>Wisconsin</b> <sup>[1]</sup> 55:22
<b>understand</b> <sup>[3]</sup> 48:16 49:14 55:8	<b>withheld</b> <sup>[1]</sup> 43:10
<b>understanding</b> <sup>[3]</sup> 10:11 52:11 59:6	<b>within</b> <sup>[7]</sup> 7:7 24:22 28:24 34:11,11 44:13 62:24
<b>unfairness</b> <sup>[2]</sup> 18:6 37:20	<b>without</b> <sup>[3]</sup> 16:5 17:5 49:11
<b>union</b> <sup>[1]</sup> 7:9	<b>withstand</b> <sup>[1]</sup> 30:17
<b>UNITED</b> <sup>[8]</sup> 1:1,18 2:6 3:7 17:18 23:24 24:23,24	<b>word</b> <sup>[3]</sup> 8:22 40:4,20
<b>universally</b> <sup>[1]</sup> 60:9	<b>words</b> <sup>[9]</sup> 7:14,25 8:23 17:23 40:8 41:2 44:12 46:6 47:22
<b>unless</b> <sup>[1]</sup> 39:4	<b>work</b> <sup>[2]</sup> 14:13,13
<b>unmistakable</b> <sup>[1]</sup> 12:6	<b>works</b> <sup>[3]</sup> 9:1 55:21,22
<b>unmistakably</b> <sup>[1]</sup> 6:1	<b>world</b> <sup>[2]</sup> 55:8,12
<b>up</b> <sup>[1]</sup> 53:12	<b>worth</b> <sup>[1]</sup> 26:19
<b>upset</b> <sup>[1]</sup> 36:23	<b>wounding</b> <sup>[1]</sup> 4:14
<b>V</b>	<b>writ</b> <sup>[1]</sup> 56:4
<b>valid</b> <sup>[1]</sup> 52:16	<b>writing</b> <sup>[1]</sup> 48:1
<b>Verlinden</b> <sup>[1]</sup> 30:25	<b>written</b> <sup>[1]</sup> 19:19
<b>version</b> <sup>[1]</sup> 42:10	<b>Y</b>
<b>versions</b> <sup>[1]</sup> 59:2	<b>years</b> <sup>[4]</sup> 28:14 54:1 57:13 63:15
<b>versus</b> <sup>[7]</sup> 4:4 6:20 7:4 8:3,20 11:21,22	<b>Yep</b> <sup>[2]</sup> 42:22,24
<b>veto</b> <sup>[3]</sup> 11:25 21:14 62:18	
<b>vetoed</b> <sup>[1]</sup> 62:17	
<b>victim</b> <sup>[1]</sup> 63:8	
<b>victims</b> <sup>[3]</sup> 13:9 20:7 62:23	
<b>view</b> <sup>[1]</sup> 44:17	
<b>viewing</b> <sup>[1]</sup> 15:7	
<b>violate</b> <sup>[1]</sup> 4:17	
<b>violation</b> <sup>[2]</sup> 25:6 59:18	
<b>virtually</b> <sup>[1]</sup> 6:16	
<b>vital</b> <sup>[1]</sup> 4:12	
<b>W</b>	
<b>waffling</b> <sup>[1]</sup> 36:13	
<b>wait</b> <sup>[1]</sup> 46:12	
<b>waived</b> <sup>[2]</sup> 58:5,7	
<b>waiver</b> <sup>[2]</sup> 12:13 62:19	
<b>walk</b> <sup>[1]</sup> 55:13	
<b>wanted</b> <sup>[3]</sup> 13:2 14:15 24:19	
<b>wants</b> <sup>[1]</sup> 7:12	
<b>Washington</b> <sup>[4]</sup> 1:12 2:2,5,8	
<b>way</b> <sup>[9]</sup> 9:2,12 21:4,23 25:18 26:5 27:13 48:3 51:18	
<b>ways</b> <sup>[1]</sup> 55:24	
<b>weird</b> <sup>[1]</sup> 46:6	